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REPORTS OF CASES
DETERMINED IN THE
APPELLATE COURTS
OF ILLINOIS

**WITH A DIRECTORY OF THE JUDICIARY OF THE STATE
CORRECTED TO JULY 18, 1914, AND ABSTRACTS OF
CASES AS DESIGNATED BY THE COURTS
UNDER ACT APPROVED JUNE 27, 1913,
IN EFFECT JULY 1, 1913.**

VOL. CLXXXVIII
A. D. 1915.

LAST FILING DATE OF REPORTED CASES:
FIRST DISTRICT, OCTOBER 8, 1914.
SECOND DISTRICT, JULY 31, 1914.
THIRD DISTRICT, JULY 2, 1914.
FOURTH DISTRICT, JULY 28, 1914.

EDITED BY
THE PUBLISHERS' EDITORIAL STAFF

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1915

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DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO DECEMBER 18, 1914.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

SAMUEL P. IRWIN..... Bloomington.

JUSTICES.

First District—ALONZO K. VICKERS..... East St. Louis.

Second District—WILLIAM M. FARMER..... Vandalia.

Third District—FRANK K. DUNN..... Charleston.

Fourth District—GEORGE A. COOKE..... Aledo.

Fifth District—CHARLES C. CRAIG..... Galesburg.

Sixth District—JAMES H. CARTWRIGHT..... Oregon.

Seventh District—ORRIN N. CARTER..... Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

CLERK.

CHARLES W. VAIL, Chicago.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

Reported by the publishers' editorial staff.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Ashland Block, Chicago.

EDWARD O. BROWN, Presiding Justice, Ashland Block, Chicago.

WM. H. MCSURELY, Justice, Ashland Block, Chicago.

FRANK BAKER, Justice, Ashland Block, Chicago.

BRANCH B.*

ALBERT C. BARNES, Presiding Justice, Ashland Block, Chicago.

MARTIN M. GRIDLEY, Justice, Ashland Block, Chicago.

FREDEBICK A. SMITH, Justice, Ashland Block, Chicago.

BRANCH C.**

JAMES S. BAUME, Presiding Justice, Galena.

WARREN W. DUNCAN, Justice, Marion.

EMERY C. GRAVES, Justice, Geneseo.

BRANCH D.**

JOSEPH H. FITCH, Presiding Justice, Ashland Block, Chicago.

KICKHAM SCANLAN, Justice, Ashland Block, Chicago.

HUGO PAM, Justice, Ashland Block, Chicago.

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

DUANE J. CARNES, Justice, Sycamore.

JOHN M. NIEHAUS, Justice, Peoria.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Platt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermillion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

CLERK—George L. Tipton, Springfield.

GEORGE W. THOMPSON, Presiding Justice, Galesburg.

EDGAR ELDREDGE, Justice, Ottawa.

WILLIAM B. SCHOLFIELD, Justice, Marshall.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185, J. & A. ¶ 2981.

** Established under act of June 6, 1911, J. & A. ¶ 2989.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Charles C. Johnson, Mount Vernon.

JAMES C. McBRIDE, Presiding Justice, Taylorville.

HARRY HIGBEE, Justice, Pittsfield.

THOMAS M. HARRIS, Justice, Lincoln.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into seventeen judicial circuits, as follows:*

FIRST CIRCUIT.

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

Judges: A. W. LEWIS, Harrisburg.

WARREN W. DUNCAN, Marion.

WILLIAM N. BUTLER, Cairo.

SECOND CIRCUIT.

The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

Judges: ENOCH E. NEWLIN, Robinson.

WILLIAM H. GREEN, Mt. Vernon.

JACOB R. CREIGHTON, Fairfield.

THIRD CIRCUIT.

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BERNREUTER, Nashville.

GEORGE A. CROW, East St. Louis.

WILLIAM E. HADLEY, Collinsville.

FOURTH CIRCUIT.

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: ALBERT M. ROSE, Louisville.

JAMES C. McBRIDE, Taylorville.

THOMAS M. JETT, Hillsboro.

FIFTH CIRCUIT.

The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

Judges: WILLIAM B. SCHOLFIELD, Marshall.

E. R. E. KIMBROUGH, Danville.

MORTON W. THOMPSON, Danville.

* Laws, 1897, 188, J. & A. ¶ 3070.

SIXTH CIRCUIT.

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Platt.

Judges: WILLIAM G. COCHRAN, Sullivan.
WM. K. WHITFIELD, Decatur.
FRANKLIN H. BOGGS, Urbana.

SEVENTH CIRCUIT.

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: JAMES A. CREIGHTON, Springfield.
FRANK W. BURTON, Carlinville.
NORMAN L. JONES, Carrollton.

EIGHTH CIRCUIT.

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBEE, Pittsfield.
ALBERT AKERS, Quincy.
GUY R. WILLIAMS, Havana.

NINTH CIRCUIT.

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.
HARRY M. WAGGONER, Macomb.
ROBERT J. GRIER, Monmouth.

TENTH CIRCUIT.

The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

Judges: JOHN M. NIEHAUS, Peoria.
THEODORE N. GREEN, Pekin.
NICHOLAS E. WORTHINGTON, Peoria.

ELEVENTH CIRCUIT.

The counties of McLean, Livingston, Logan, Ford and Woodford.

Judges: COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

TWELFTH CIRCUIT.

The counties of Will, Kankakee and Iroquois.

Judges: DORRANCE DIBELL, Joliet.
ARTHUR W. DESELM, Kankakee.
FRANK L. HOOPER, Watseka.

THIRTEENTH CIRCUIT.

The counties of Bureau, La Salle and Grundy.

Judges: SAMUEL C. STOUGH, Morris.
JOE A. DAVIS, Princeton.
EDGAR ELDREDGE, Ottawa.

FOURTEENTH CIRCUIT.

The counties of Rock Island, Mercer, Whiteside and Henry.

Judges: ROBERT W. OLNSTED, Rock Island.

FRANK D. RAMSAY, Morrison.

EMERY C. GRAVES, Geneseo.

FIFTEENTH CIRCUIT.

The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

Judges: RICHARD S. FARRAND, Dixon.

JAMES S. BAUME, Galena.

OSCAR E. HEARD, Freeport.

SIXTEENTH CIRCUIT.

The counties of Kane, Du Page, De Kalb and Kendall.

Judges: CLINTON F. IRWIN, Elgin.

DUANE J. CARNES, Sycamore.

MAZZINI SLUSSEB, Downers Grove.

SEVENTEENTH CIRCUIT.

The counties of Winnebago, Boone, McHenry and Lake.

Judges: ARTHUR H. FROST, Rockford.

CHARLES H. DONNELLY, Woodstock.

CLAIRE C. EDWARDS, Waukegan.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex officio, of the Criminal Court.

CRIMINAL COURT.

CLERK—FRANK J. WALSH, Criminal Court Building, Chicago.

CIRCUIT COURT.

CLERK—JOHN W. RAINEY, County Building, Chicago.

JUDGES.

EDWARD O. BROWN,
RICHARD S. TUTHILL,
JESSE A. BALDWIN,
FRANK BAKER,
KICKHAM SCANLAN,
THOMAS G. WINDES,
MERITT W. PINCKNEY,

JOHN GIBBONS,
ADELOR J. PETIT,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JOHN P. MCGOORTY,
FREDERICK A. SMITH,
CHARLES M. WALKER.

SUPERIOR COURT.

CLERK—RICHARD J. McGRATH, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY,
JOHN M. O'CONNOR,
THEODORE BRENTANO,
RICHARD E. BURKE,
THOMAS C. CLARK,
WILLIAM FENIMORE COOPER,
WILLIAM E. DEVER,
MARTIN M. GRIDLEY,
CHARLES A. McDONALD,

MARCUS A. KAVANAGH,
JOSEPH H. FITCH,
HENRY V. FREEMAN,
ALBERT C. BARNES,
HUGO PAM,
M. L. MCKINLEY,
CLARENCE N. GOODWIN,
CHARLES M. FOELL,
DENIS E. SULLIVAN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. ¶ 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. ¶ 3289.

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge.

ALLAN G. MACDONALD, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge.

J. W. GREENAWAY, Clerk.

THE CITY COURT OF BEARDSTOWN.

J. J. COOKE, Judge.

JOHN LISTMANN, Clerk.

THE CITY COURT OF CANTON.

H. C. MORAN, Judge.

ERNEST HIPSLEY, Clerk.

THE CITY COURT OF CENTRALIA.

ALBERT D. RODENBERG, Judge.

GUY C. LIVESAY, Clerk.

THE CITY COURT OF CHARLESTON.

CHARLES A. QUACKENBUSH, Judge.

CORA DANIELS, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

CHARLES H. BOWLES, Judge.

EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF DE KALB.

JOHN A. DOWDALL, Judge.

JOHN C. KILLIAN, Clerk.

THE CITY COURT OF DU QUOIN.

BENJAMIN W. POPE, Judge.

HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

ROBERT H. FLANNIGAN,

W. M. VANDEVENTER,

Judges.

WILLIAM J. VEACH, Clerk.

THE CITY COURT OF ELGIN.

EDWARD M. MANGAN, Judge.

CHARLES S. MOTE, Clerk.

THE CITY COURT OF GRANITE CITY.

M. R. SULLIVAN, Judge.

JACK MELLON, Clerk.

THE CITY COURT OF HARRISBURG.

WM. H. PARISH, JR., Judge.

HOMER WADE, Clerk.

THE CITY COURT OF HERRIN.

ROBERT T. COOK, Judge.

WM. R. KEE, Clerk.

THE CITY COURT OF KEWANEE.

H. STERLING POMEROY, Judge.

CHARLES L. ROWLEY, Clerk.

THE CITY COURT OF LITCHFIELD.

DAN W. MADDOX, Judge.

LAURETTA SALZMAN, Clerk.

THE CITY COURT OF MACOMB.

JOSIE WESTFALL, Judge.

WM. B. MARTIN, Clerk.

THE CITY COURT OF MARION.

W. O. POTTER, Judge.

GEO. T. CARTER, Clerk.

THE CITY COURT OF MATTOON.

JOHN McNUTT, Judge.

THOMAS M. LYTLE, Clerk.

THE CITY COURT OF PANA.

J. H. FORNOFF, Judge.

G. W. MARSLAND, Clerk.

THE CITY COURT OF STERLING.

CARL E. SHELDON, Judge.

EARL L. HESS, Clerk.

THE CITY COURT OF SPRING VALLEY.

WILLIAM HAWTHORNE, Judge.

WILLIAM H. BURNELL, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge.

O. L. SPRECHER, Clerk.

(6) MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158), J. & A. §§ 3313 et seq.

FRANK P. DANISCH, Clerk.

CHIEF JUSTICE,
HARRY OLSON.

ASSOCIATE JUDGES.

HARRY M. FISHER	HUGH J. KEARNS	JOHN J. ROONEY
EDWARD T. WADE	JOSEPH S. LABUY	SAMUEL H. TRUDE
JOHN K. PRINDIVILLE	JOHN R. NEWCOMER	JOSEPH E. RYAN
JOSEPH P. RAFFERTY	JOHN R. CAVERLY	EDMUND J. JARECKI
JOHN COURTNEY	CHAS. A. WILLIAMS	CHARLES N. GOODNOW
JOHN J. SULLIVAN	JACOB H. HOPKINS	PATRICK B. FLANAGAN
JOHN A. MAHONEY	HARRY P. DOLAN	DENNIS W. SULLIVAN •
WILLIAM N. GEMMILL	JOSEPH SABATH	SHERIDAN E. FRY
FRANK H. GRAHAM	JAMES C. MARTIN	JOHN STELK
DAVID SULLIVAN	*THOMAS F. SCULLY	JOSEPH Z. UHLIR

* Resigned December 5, 1914.

(7) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, LaSalle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermilion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.), J. & A. ¶ 3259.

JUDGES.	COUNTIES.	COUNTY SEATS.
LYMAN McCARL.....	Adams.....	Quincy.
MILES F. GILBERT.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JAMES R. PRICHARD.....	Bureau.....	Princeton.
JOHN DAY, JR.....	Calhoun.....	Hardin.
ARTHUR J. GRAY.....	Carroll.....	Mt. Carroll.
CHARLES Æ. MARTIN.....	Cass.....	Virginia.
ROY C. FREEMAN.....	Champaign.....	Urbana.
CHARLES A. PRATER.....	Christian.....	Taylorville.
A. F. RUFFNER.....	Clark.....	Marshall.
JOHN L. BOYLES.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
JOHN P. HARBAH.....	Coles.....	Charleston.
THOMAS F. SCULLY.....	Cook.....	Chicago.
HENRY HORNER, Pro. J.....	Cook.....	Chicago.
DUANE GAINES.....	Crawford.....	Robinson.
STEPHEN B. RABIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
D. H. WAMSLEY.....	Douglas.....	Tuscola.
S. J. RATHJE.....	DuPage.....	Wheaton.
DANIEL V. DAYTON.....	Edgar.....	Paris.
PETER C. WALTERS.....	Edwards.....	Albion.
BARNEY OVERBECK.....	Effingham.....	Effingham.
FRED C. MEYERS.....	Fayette.....	Vandalia.
M. L. McQUISTON.....	Ford.....	Paxton.
NEALY I. GLENN.....	Franklin.....	Benton.
HOBART S. BOYD.....	Fulton.....	Lewistown.
GEORGE L. HOUSTON.....	Gallatin.....	Shawneetown.
THOMAS HENSHAW.....	Greene.....	Carrollton.
GEORGE BEDFORD.....	Grundy.....	Morris.
J. S. SNEED.....	Hamilton.....	McLeansboro.
E. W. DUNHAM.....	Hancock.....	Carthage.
HENRY M. WINDERS.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
LEONARD E. TELLEN.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
HARRY C. DAVIDSON.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
HARRY W. POGUE.....	Jersey.....	Jerseyville.
F. J. CAMPBELL.....	Jo Daviess.....	Galena.
J. F. HIGHT.....	Johnson.....	Vienna.
S. N. HOOVER.....	Kane.....	Geneva.
JOHN H. WILLIAMS, Pro. J..	Kane.....	Geneva.
JAY H. MERRILL.....	Kankakee.....	Kankakee.
CLARENCE S. WILLIAMS.....	Kendall.....	Galesburg.
R. C. RICE.....	Knox.....	Yorkville.
PERRY L. PERSONS.....	Lake.....	Waukegan.
HENRY MAYO.....	La Salle.....	Ottawa.

JUDGES.	COUNTIES.	COUNTY SEATS.
ALBERT T. LARDIN, Pro. J....	La Salle.....	Ottawa.
OTTO LONGNECKER.....	Lawrence.....	Lawrenceville.
JOHN B. CRABTREE.....	Lee.....	Dixon.
B. R. THOMPSON.....	Livingston.....	Pontiac.
CHARLES J. GEHLBACH.....	Logan.....	Lincoln.
JOHN H. MCCOY.....	Macon.....	Decatur.
ANDREW J. DUGGAN.....	Macoupin.....	Carlinville.
H. B. EATON.....	Madison.....	Edwardsville.
JOSEPH P. STREUBER, Pro. J....	Madison.....	Edwardsville.
WILLIAM G. WILSON.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
CHARLES I. IMES.....	McDonough.....	Macomb.
DAVID T. SMILEY.....	McHenry.....	Woodstock.
JAMES C. RILEY.....	McLean.....	Bloomington.
JESSE M. OTT.....	Menard.....	Petersburg.
F. L. CHURCH.....	Mercer.....	Aledo.
HENRY SCHNEIDER.....	Monroe.....	Waterloo.
J. T. MCDAVID.....	Montgomery.....	Hillsboro.
WM. E. THOMSON.....	Morgan.....	Jacksonville.
JOHN T. GRIDER.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
CLYDE E. STONE.....	Peoria.....	Peoria.
WALTER A. CLINCH, Pro. J....	Peoria.....	Peoria.
LOUIS R. KELLY.....	Perry.....	Pinckneyville.
WM. A. DOSS.....	Platt.....	Monticello.
PAUL F. GROTE.....	Pike.....	Pittsfield.
BENJ. F. ANDERSON.....	Pope.....	Golconda.
FRED HOOD.....	Pulaski.....	Mound City.
IRVING E. BROADDUS.....	Putnam.....	Hennepin.
WM. M. SCHUWEK.....	Randolph.....	Chester.
ROBT. B. WITCHER.....	Richland.....	Olney.
NELS A. LARSON.....	Rock Island.....	Rock Island.
BENJ. S. BELL, Pro. J.....	Rock Island.....	Rock Island.
CHAS. D. STILWELL.....	Saline.....	Harrisburg.
JOHN B. WEAVER.....	Sangamon.....	Springfield.
C. H. JENKINS, Pro. J.....	Sangamon.....	Springfield.
JOHN C. WORK.....	Schuyler.....	Rushville.
F. C. FUNK.....	Scott.....	Winchester.
A. J. STEIDLEY.....	Shelby.....	Shelbyville.
FRANK THOMAS.....	Stark.....	Toulon.
JOSEPH B. MESSICK.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ROSCOE J. CARNAHORN.....	Stephenson.....	Freeport.
JAMES M. RAHN.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
LAWRENCE T. ALLEN.....	Vermillion.....	Danville.
W. J. BOOKWALTER, Pro. J....	Vermillion.....	Danville.
W. S. WILLHITE.....	Wabash.....	Mt. Carmel.
L. E. MURPHY.....	Warren.....	Monmouth.
W. P. GREEN.....	Washington.....	Nashville.
J. V. HEIDINGER.....	Wayne.....	Fairfield.
J. M. ENDICOTT.....	White.....	Carmi.
WM. A. BLODGETT.....	Whiteside.....	Morrison.
GEORGE J. COWING.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J....	Will.....	Joliet.
W. F. SLATER.....	Williamson.....	Marion.
LOUIS M. RECKHOW.....	Winnebago.....	Rockford.
ARTHUR C. FORT.....	Woodford.....	Eureka.

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CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS

DURING THE YEAR 1914.

In re Estate of Christian Wresche.

**Emma Ackman et al., Appellants, v. Christian C.
Wresche et al., Appellees.**

Gen. No. 5,962. (Not to be reported in full.)

Appeal from the Circuit Court of McHenry county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed July 31, 1914.

Statement of the Case.

Proceeding on appeal by Emma Ackman and Dora Thies in the matter of the estate of Christian Wresche to the Circuit Court from an order of the County Court admitting the will of Christian Wresche to probate. A hearing was had in the Circuit Court and the testimony of the subscribing witnesses was introduced. From a judgment finding the instrument to be a will, the appellants in the Circuit Court prosecute this appeal.

The People v. Thexton, 188 Ill. App. 2.

Appellants urge that the judgment be reversed without remanding.

EDWARD D. SHURTLEFF, for appellants; C. P. BARNES, of counsel.

No appearance for appellees.

MR. JUSTICE WHITNEY delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1803*—*when reversal should be with remandment.* On appeal from an order of the Circuit Court finding in favor of a will, where the record does not show that the paper which the subscribing witnesses swore they signed and the testator signed was the will, the Appellate Court should not reverse without remanding.

The People of the State of Illinois, Appellee, v. Louis Thexton, Appellant.

Gen. No. 5,963. (Not to be reported in full.)

Appeal from the Circuit Court of Du Page county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 31, 1914.

Statement of the Case.

Action by the People of the State of Illinois against Louis Thexton to recover a penalty for the violation of the automobile law, the offense charged being the running of an automobile at a rate of speed prohibited by statute. Judgment was entered against defendant for five dollars penalty. To reverse the judgment, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. DeWalt, 188 Ill. App. 3.

J. C. MURPHY and E. L. LYON, for appellant.

CHARLES W. HADLEY, for appellee.

MR. JUSTICE WHITNEY delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 1*—*when finding of guilty of unlawful speed sustained by evidence.* In an action to recover a penalty for running an automobile at a rate of speed prohibited by statute, a finding of guilty *held* sustained by sufficient evidence.

2. AUTOMOBILES AND GARAGES, § 1*—*necessity of intent to constitute violation of automobile law.* The only intention necessary to render a person liable to a penalty for a violation of the automobile law is the doing of the act prohibited.

3. APPEAL AND ERROR, § 1715*—*when objection to remedy for review waived.* The right of appellee to raise the question that the case could only be presented for review by a writ of error is waived by joining in a stipulation as to the bill of exceptions and filing briefs in the Appellate Court.

The People of the State of Illinois ex rel. Emily Jane Ray, Appellee, v. John DeWalt, Appellant.

Gen. No. 5,965. (Not to be reported in full.)

Appeal from the County Court of Marshall county; the Hon. WALTER A. CLINCH, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed July 31, 1914.

Statement of the Case.

Action by the People of the State of Illinois ex rel. Emily Jane Ray against John DeWalt charging the defendant with being the father of a bastard child of

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

The M. G. Ogle Co-Op. House Furn. Co. v. Shauman, 188 Ill. App. 4.

Emily Jane Ray. From a judgment of conviction, defendant appeals.

HOMER BARNEY and QUINN, QUINN & McGRATH, for appellant.

HENRY E. JACOBS, for appellee.

MR. JUSTICE WHITNEY delivered the opinion of the court.

Abstract of the Decision.

INSTRUCTIONS, § 48*—*when instruction as to weight of evidence misleading.* An instruction in a bastardy proceeding telling the jury that the most convincing evidence was on the side of the People, and also telling the jury that the law is that the most convincing evidence is on the side of the People without regard to the number of witnesses, *held* misleading, and the giving of the same reversible error.

The M. G. Ogle Co-Operative House Furnishing Company, Appellant, v. J. I. Shauman, Appellee.

Gen. No. 5,970.

1. ASSIGNMENTS, § 3*—*right to assign future wages by power of attorney.* A workman cannot execute a power of attorney to authorize the assignment of wages to be earned in an employment which he is not engaged, and has no contract for, at the time of the execution of the power of attorney.

2. ASSIGNMENTS, § 3*—*right of workman to assign wages.* A workman cannot by himself assign wages to be earned in a future employment for which he has not contracted at the time of the assignment.

Appeal from the Circuit Court of Warren county; the Hon. ROBERT J. GRIER, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 31, 1914.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

The M. G. Ogle Co-Op. House Furn. Co. v. Shauman, 188 Ill. App. 4.

HANNA & LAUDER, for appellant.

SAFFORD & GRAHAM, for appellee.

MR. JUSTICE WHITNEY delivered the opinion of the court.

This action was begun before a justice of the peace in a suit by appellant to recover wages of a workman for appellee, an assignment of which wages appellant claimed under a power of attorney given by the workman before he engaged in the employment. On appeal to the Circuit Court defendant had judgment. Plaintiff appeals. The real question in the case is, can the workman execute a valid power of attorney which will authorize his attorney in fact to assign wages earned in an employment in which the workman is not then engaged and has no contract for at the time of the execution of the power of attorney.

It is conceded to be the law, and indeed it is the law of this State, that a workman cannot himself assign wages to be earned in a future employment for which he has not contracted at the time of the assignment; but it is urged while he cannot do this himself he may do it by power of attorney. No authority is cited in favor of this suggestion.

An assignment of wages is not operative or valid when made in reference to a new or different contract of employment not then in existence. *Mallin v. Wenham*, 209 Ill. 252.

Nor can he assign his wages by an attorney in fact authorized by power of attorney, entered into before the contract of employment is made. *Stromberg, Allen & Co. v. Hill*, 170 Ill. App. 323; *Richards v. Inter Ocean Newspaper Co.*, 181 Ill. App. 515; *Blakeslee v. Make-Man Tablet Co.*, 175 Ill. App. 515.

The employment of the workman was in September, 1912. He executed the power of attorney in question September 25, 1911, and the attorney in fact made the

Com'rs of Highways v. Drainage Com'rs, etc., 188 Ill. App. 6.

assignment January 17, 1913, so under the authorities above cited this judgment is affirmed.

Judgment affirmed.

Commissioners of Highways of Town of Tampico, Appellees, v. Drainage Commissioners of Drainage District No. 2 of Tampico and Hahnaman Townships, Appellants.

Gen. No. 5,828. (Not to be reported in full.)

Appeal from the Circuit Court of Whiteside county; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the October term, 1912. Affirmed. Opinion filed July 31, 1914.

Statement of the Case.

Petition by the Commissioners of Highways of the Town of Tampico against the Drainage Commissioners of Drainage District No. 2 of Tampico and Hahnaman Townships for a writ of mandamus to compel the drainage commissioners to replace a bridge over a drainage ditch where said ditch crosses a certain highway, and to levy an assessment therefor if necessary. The respondents filed an answer and pleas. A demurrer was sustained to certain pleas and issues were joined on the answer and the rest of the pleas. A jury was waived, proofs were heard and a mandamus was awarded pursuant to the prayer of the petition. To reverse the judgment, respondents appeal.

CARL E. SHELDON and WILLIAM GRAHAM, for appellants.

HENRY C. WARD, for appellees.

PER CURIAM.

Com'rs of Highways v. Drainage Com'rs, etc., 188 Ill. App. 6.

Abstract of the Decision.

APPEAL AND ERROR, § 1755*—*when judgment will be affirmed by a divided court.* On appeal to the Appellate Court where the judge assigned to write the majority opinion died and the other two judges were unable to agree, *held* that the judgment would be affirmed, it appearing that there would be a delay of several months before the successor of the deceased judge could consider the case, and it also appearing that whichever party is defeated will take the case to the Supreme Court.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

CASES
DETERMINED IN THE
THIRD DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEARS 1913 AND 1914.

**Adam Hess, Appellant, v. Board of Trustees of the
Police Pension Fund of the City of Bloomington,
Appellee.**

1. MUNICIPAL CORPORATIONS, § 143*—*right of policeman to pension.* A policeman is entitled to become a pensioner of fund under chapter 24, p. 376, Hurd's R. S., J. & A. ¶ 1877, though his twenty years' service was not continuous for such period.

2. MUNICIPAL CORPORATIONS, § 143*—*sufficiency of demand to be placed on police pension roll.* A written application to a trustee of the police pension fund to be placed on the pension roll held a sufficient demand, if any demand is necessary.

3. MUNICIPAL CORPORATIONS, § 143*—*section 7 of Police Pension Act construed.* Section 7 of the act creating a pension fund for policeman, (chapter 24, p. 376, Hurd's R. S., J. & A. ¶ 1881) has no application to a policeman who has not retired under the act.

4. MUNICIPAL CORPORATIONS, § 143*—*section 1 of Police Pension Act construed.* Clause 5 of section 1 of the act creating a pension fund for policemen (J. & A. ¶ 1875) does not apply to a policeman who has never been a pensioner.

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Hess v. Board of Trustees, 188 Ill. App. 8.

October term, 1913. Reversed and remanded with directions. Opinion filed December 27, 1913. Rehearing denied April 9, 1914.

MURRAY & MORRISSEY, for appellant.

A. W. PEASLEY, for appellee.

MR. JUSTICE ELDBEDGE delivered the opinion of the court.

Appellant filed his petition for a peremptory writ of mandamus in the Circuit Court of McLean county to compel the Board of Trustees of the Police Pension Fund of the City of Bloomington, appellee, to designate him as a pensioner of said fund and place his name on the pension roll under an act of the Legislature creating pension funds in cities having a population of not less than 20,000 and not more than 50,000 (chapter 24, page 376, Hurd's R. S., J. & A. ¶ 1877.) The case was tried upon a stipulation of facts and the writ denied.

At the time the act went into effect appellant was fifty-four years of age and had served upon the police force in the City of Bloomington at different times prior to November 17, 1909, a total of twenty-four years, but he had at no time served for a period of twenty years continuously. On November 17, 1909, he was discharged from the police force and was not a member from that time until May, 1911, when he was reinstated and again began service, and from that time to the present has been on the police force.

It is contended by appellee that twenty years "continuous" service is necessary under the act to entitle a policeman to become a pensioner of a pension fund. The word "continuous" is not used in the act. There are a number of acts providing for pensions for different employments and in only one is the word "continuous" used. The act providing for pensions for firemen as amended in 1907 (J. & A. ¶ 1897) provides that the last two years of the employment shall be continu-

Hess v. Board of Trustees, 188 Ill. App. 8.

ous, thus indicating that the service for the balance of the time need not have been continuous.

No such expression is used in the act in regard to policemen, and it is clear that if the Legislature had intended that the twenty years' service should have been continuous it would have so stated. It is also insisted that a formal demand should have been made upon the Board of Trustees by the petitioner to place him upon said pension roll. The statute does not provide for any formal demand. The stipulation of facts shows that the petitioner presented a written application to be placed on the pension roll to one of the trustees. If any demand was necessary this was sufficient. It is also contended that petitioner did not report every thirty days to the Board under section 7 of the act (J. & A. ¶ 1881). This section provides that all members of the police force "who may be retired under the provisions of this act, except those who voluntarily retire after twenty years' service, shall report to the chief of police * * * on the second Tuesday of each and every month," etc. This had no application to the petitioner because he had not been retired under said act. It is further objected that the petitioner did not contribute to the pension fund under clause 5 of section 1 (J. & A. ¶ 1875). This clause provides that one per cent. per month shall be paid or deducted from the pension of every police pensioner. It is apparent that the petitioner never having been a pensioner, there was no duty on him to either pay or have deducted anything from a pension which he did not have.

The judgment of the trial court will be reversed and the cause remanded with directions to issue the writ as prayed for in the petition.

Reversed and remanded with directions.

Fox v. Chicago & Alton R. Co., 188 Ill. App. 11.

T. U. Fox, Appellee, v. Chicago & Alton Railroad Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLSTON D. MYERS, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed December 27, 1913. Rehearing denied April 9, 1914.

Statement of the Case.

Action by T. U. Fox against Chicago & Alton Railroad Company to recover damages for failure of defendant to furnish cars for the shipment of corn. The facts showed that plaintiff ordered cars with grain doors on Aug. 12, 1910, but received no cars equipped with such doors until Sept. 5, 1910. Plaintiff desired to sell his corn in East St. Louis, and owing to the delay in getting cars claimed a loss of seven cents per bushel on account of the decline of the market price therefor.

The jury returned a verdict for one-half the amount.

To reverse a judgment entered on the verdict, defendant appeals.

Appellant urges that it was the duty of appellee to have lessened the loss by furnishing the grain doors himself, and that though he had no lumber with which to make doors he should have ordered it from a neighboring city in case there was no lumber yard at the point of shipment.

BRACKEN & YOUNG and W. B. LEACH, for appellant; SILAS H. STRAWN, of counsel.

LIVINGSTON & BACH, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Aston v. Aston, 188 Ill. App. 12.

Abstract of the Decision.

1. CARRIERS, § 16*—*duty to furnish suitable cars.* It is the duty of a carrier to furnish cars suitable for the transportation of the commodity for which they were ordered.

2. CARRIERS, § 16*—*when not duty of shipper to furnish grain doors.* Where cars are ordered of a carrier for the shipment of grain and the cars furnished are without grain doors, it is not the duty of the shipper to furnish the grain doors himself in order to lessen the loss which might result from a delay in furnishing cars equipped with such doors.

3. CARRIERS, § 20*—*when instruction as damages for delay in furnishing cars incorrect.* In an action against a carrier for damages resulting from a delay in furnishing cars, an instruction that the measure of damages is the difference between the market value at the point of shipment at the time the cars should have been furnished and the market price when the cars were actually furnished, *held* incorrect as confining the market price to that prevailing at the point of shipment.

4. APPEAL AND ERROR, § 1241*—*when appellant cannot complain of his adversary's instruction.* Appellant cannot complain of his adversary's instruction as to the measure of damages where his own given instruction announced the same rule.

Thomas Aston, Appellee, v. Jacob Aston, Appellant.

1. LIMITATION OF ACTIONS, § 94*—*when creditor cannot apply payment to revive barred note.* Where a person owes a creditor on several notes, some of which are barred by the statute of limitations, the creditor cannot apply a payment to a barred note so as to revive it except by the direction of the debtor.

2. LIMITATION OF ACTIONS, § 79*—*what not a new promise to pay note.* An expression in a letter from the maker of certain notes to the holder, "With regard to the notes * * * I will come over as soon as I can and we will fix it up," *held* not to constitute a new promise in writing to pay the notes so as to toll the statute of limitations.

Appeal from the Circuit Court of Logan county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the October

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Aston v. Aston, 188 Ill. App. 12.

term, 1913. Reversed with finding of facts. Opinion filed December 27, 1913. Rehearing denied April 9, 1914.

McCORMICK & MURPHY, for appellant.

BEACH & TRAPP and **BEVAN & BEVAN**, for appellee.

MR. JUSTICE THOMPSON delivered the opinion of the court.

This is a suit begun in April, 1913, in the Circuit Court of Logan county by Thomas Aston upon eight promissory notes made by Jacob Aston, a brother of plaintiff. The declaration consists of special counts declaring on each note and the common counts. The defendant pleaded the general issue and the statute of limitations. To the statute of limitations the plaintiff filed replications of payments averred to have been made on each note within ten years and a new promise in writing to pay each of said notes made, within ten years prior to the beginning of the suit.

The oldest note sued on is dated September 1, 1887, and is for \$380, due one day after date with eight per cent. interest. There are indorsed on it a credit of \$50 April 1, 1909, and another of \$10.69 March 16, 1912. The other notes are for different sums varying from \$150 to \$400. The last one is dated in April, 1899, and is for \$360.75, due in one year, and has credits indorsed on it Feb. 11, 1903, \$125, and March 16, 1912, \$5. Each of the other notes bears an indorsement of a credit of \$5, of date March 12, 1912.

The case was tried before the court without a jury. The court rendered judgment for plaintiff for \$1,112.80, and for costs against the defendant on the note dated September 1, 1887. The defendant appeals.

The notes upon which the suit is brought were all due more than ten years before the beginning of the suit. The statute of limitations is a good defense to each note, unless the plaintiff has proved one of his

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replications to some of the notes by a preponderance of the evidence, in which event he would be entitled to a judgment on the notes to which he has proved the averments of his replication.

The evidence is clear that on April 1, 1909, the defendant paid \$50 to the plaintiff. The evidence of the plaintiff and the defendant is conflicting as to where and how this payment was made, and whether or not the defendant directed on which note this payment should be applied or left its application to the plaintiff. The plaintiff testified that he received the payment by check or draft in a letter and that no application was made of the money by the defendant and that he applied it as a payment on the note of September 1, 1887, and that by this payment the bar of the statute was removed.

The defendant testified that he made the payment in cash and that he, the defendant, indorsed the payment on a note for \$57.15, dated December 5, 1885. The plaintiff denied that he ever had any such note executed by the defendant.

The evidence of the defendant is corroborated by Cyrus J. McCormick, assistant cashier of the Farmers Bank of Emden, who testified that in September, 1910, the bank at Emden had for collection for the plaintiff against the defendant two notes; that one was a note dated December 5, 1885, due December 7, 1885, made by Jacob Aston to Thomas Aston for \$57.15, on which there was indorsed \$50, paid April 1, 1909, the collection being bank No. 5,814. The collection register of the bank was produced and showed entries concerning such a note for collection. He also testified that he presented this note to Jacob Aston for collection and that defendant told him to return it to his brother Tom. The defendant also introduced in evidence the following letter written by Thomas Aston in September, 1910, with which he sent two notes to the bank at Emden for collection: "Atlanta, September, 1910. I sent these

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notes for you to colect, entrest on small note \$54. dolars 30 cts. balance of note 7 dol. 15 cets. \$50 dolars pade april first 1909, entrest on big not \$112 dol. 75 cts. one hundred \$25 dolars pade on big note febery first 1909. balance of big note \$235 dolars 75 cts. keep these nots at bank tel pade i put entrest don at 4 per cent. you can count the entrest see if it is rite. Thomas Aston. to W. W. McCormick." Memorandum stamped thereon, "Returned unpaid November 10, 1910, No. 5,814-5,815."

The clear preponderance of the evidence shows that the payment of \$50 made April 1, 1909, was credited on a note dated December 5, 1885, not sued on in this case. The plaintiff cannot by changing the credit for this sum from the note it was originally credited on to the note of September 1, 1887, thereby revive the latter note.

The claim of plaintiff that he had the right to and applied the payment of the \$50 note of September 1, 1887, and that said note was thereby revived, is also answered by the fact that at the time that payment was made plaintiff held a note for \$360.75, dated April 1, 1899, due in one year, against which the statute had not run. The statute had run against all the other notes unless some act of the defendant had tolled the running of the statute. There is no direct authority in this State on the question whether an undirected application of a payment made by a debtor, who owes several notes to the same creditor, some of which are and one of which is not barred by the statute of limitations, will raise the bar of the statute when applied by the creditor to one of the notes against which the statute has run so as to revive the cause of action against the unpaid portion of the barred note. The English doctrine is that such application will not take the balance of the debt out of the statute. *Mills v. Fowkes*, 5 Bing. N. C. 455. Massachusetts, Maine and Colorado follow the English doctrine. *Pond v. Will-*

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iams, 1 Gray 630; *Blake v. Sawyer*, 83 Me. 129; *McBride v. Noble*, 40 Colo. 372. Vermont and Missouri hold the other way. *Ayer v. Hawkins*, 19 Vt. 26; *Shannon v. Austin*, 67 Mo. 485. The reasoning of the Supreme Court of Illinois in *Lowery v. Gear*, 32 Ill. 383, would seem to indicate that that court will follow the Massachusetts rule. The Court in the *Lowery* case said that "it is a general rule, no doubt, that where a debtor makes a payment without designating to which of several claims it shall apply, the creditor may apply it to which he pleases; but this could not authorize Brown to so apply it as to bind Gear by an implied new promise, without the actual intention of Gear to make such a promise. This was a matter in which Gear must have had an affirmative intention, before he could be bound." * * * "If he had no thought or intention one way or the other, even then he could not be held to have made a new promise, for to do that he must have had an affirmative intention." The payment by a debtor owing an account of a sum not more than sufficient to cover recent items is not sufficient to remove the bar of the statute from items of older date without evidence of the debtor's intention to apply such payments to that purpose. *Miller v. Cinnamon*, 168 Ill. 447. The rule deducible from the reasoning in this State and the weight of the authorities would appear to be that the creditor may apply it to any valid and binding indebtedness but that he cannot apply it to revive a debt already outlawed except by the direction of the debtor.

The plaintiff has assigned cross-errors and insists that the court erred in not rendering judgment in favor of plaintiff on all the notes. He contends that other payments were made by the defendant on all the notes within ten years, and that the defendant within ten years prior to the beginning of the suit made a promise in writing to pay the notes.

The credits of date March 16, 1912, were indorsed by R. F. Quisenberry, a banker at Atlanta, at the re-

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quest of plaintiff. The evidence shows that the defendant, who was in the grain and coal business at Emden, on March 14, 1912, paid taxes amounting to \$45.69 on eighty acres of land in Logan county belonging to the plaintiff, and on March 15th forwarded the receipt to plaintiff with a letter, simply stating "I paid your taxes and send you your receipt." The plaintiff the next day had Quiesenberry indorse \$10.69 on the note dated September 1, 1887, and \$5 on each of the other seven notes. There is no evidence whatever that the defendant intended the payment of taxes to be applied on any indebtedness of his to the plaintiff, and the defendant testified that his brother's tenant hauled and delivered grain to him off his brother's farm: "His renter hauled it in and told me to pay his taxes and keep it out of the grain hauled in. I kept the amount paid for taxes out of grain and settled with plaintiff for balance." There is no evidence whatever showing that the defendant intended this payment of taxes to be applied on any indebtedness of his to the plaintiff, and the evidence does show that it was not so intended.

The contention of plaintiff that the defendant had within ten years promised in writing to pay the notes is based upon the following letters written by the defendant.

"Emden, Ill., Sept. 9, 1910.

Atlanta, Ills.

Thomas Aston

Well Tom, in regard to the notes you sent over to colect, I will come over as soon as I can and we will fix it up some way, if I can't come through the week will come over some Sunday.

From Brother,

J. R. Aston."

"Emden, Ill., Nov. 29, 1911.

Thom Aston,

Atlanta.

Dear Sir:—Thom I will be over before long to see

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you about the notes. Have them at your house. I may come Sunday; if the notes are at the bank you get them so we can look them over.

Your brother, J. R. Aston."

The only expression in the letters which could by any possibility be construed into a promise to pay the notes is the expression in the first letter—"Well Tom, in regard to the notes you sent over to colect, I will come over as soon as I can and we will fix it up some way." This expression either by itself or in connection with the other parts of the letter does not show either an acknowledgment of the debt or an unqualified willingness and intention to pay it. It amounts to a statement that their matters would be explained when they met, and as was said in *Wachter v. Albee*, 80 Ill. 47, and in *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161, the language used, "we will fix it up some way," cannot be held to be a promise to pay the debt.

The evidence was not sufficient to authorize any recovery in favor of plaintiff. The judgment is reversed with a finding of facts that the note was barred by the statute and there was neither proof of payment on the note upon which judgment was entered nor a new promise in writing to pay the note.

The clerk will enter the finding of facts in the judgment of this court.

Reversed with finding of facts.

Lona L. Taylor, Appellee, v. Emma Wilcox, Administratrix, Appellant.

1. DAMAGES, § 175*—*evidence admissible to show pecuniary condition of party.* In an action by a wife for the alienation of her husband's affections, where the plaintiff sought to show the financial condition of defendant for the purpose of increasing punitive damages, *held* that the will of defendant's deceased husband showing defend-

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Taylor v. Wilcox, 188 Ill. App. 18.

ant was the sole beneficiary and the order of court admitting it to probate were not improperly admitted, but that an affidavit and deposition of subscribing witnesses taken to prove the execution of the will were improperly admitted for the reason they did not tend to prove anything material to the issues.

2. DAMAGES, § 175*—*when inheritance tax appraiser's report inadmissible to show financial condition of party.* In an action by a wife to recover damages for the alienation of her husband's affections, where the plaintiff sought to introduce evidence of the defendant's financial condition for the purpose of increasing punitive damages, the admission in evidence of a report of an inheritance tax appraiser in the estate of the defendant's husband held error, where there was nothing in the record of any order of the County Court appointing the appraiser nor any order of the court confirming such report, and the report did not show that notice was given by the appraiser to the defendant.

3. HUSBAND AND WIFE, § 278*—*damages recoverable in suit for alienation of husband's affections.* Although the usual measure of damages for a wife in a suit for alienating her husband's affections is the value of her support and loss of consortium and for mental anguish and injury to her feelings, she is also entitled to recover for the support of children over twelve years of age where the wanton acts of the defendant caused the hardship to be imposed upon her of caring for such children.

4. HUSBAND AND WIFE, § 278*—*when instruction in suit for alienation erroneous.* In an action by a wife for the alienation of her husband's affections, an instruction on question of damages held erroneous, in so far as it permitted plaintiff to recover for injury to the good name and character of her family, and for the family's dishonor.

Appeal from the Circuit Court of Vermillion county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding. Heard in this court at the April term, 1913. Reversed and remanded. Opinion filed May 5, 1914.

C. M. CRAYTON and CHARLES TROUP, for appellant.

A. A. JOHNSON and R. ALLAN STEPHENS, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Taylor v. Wilcox, 188 Ill. App. 18.

Lona L. Taylor brought this action May 1, 1911, in case against Minnie Stark to recover damages for the alienation of the affections of Simon L. Taylor, the husband of plaintiff. A jury returned a verdict for plaintiff for \$2,541.71, on which judgment was rendered. The defendant appealed. After the appeal was perfected the death of appellant was suggested, and the appeal is prosecuted by Emma Wilcox, administratrix of the deceased appellant.

V. H. Stark, the husband of Minnie Stark, died testate November 11, 1911. The case was tried in the Circuit Court in December, 1912. The cause of action is such that if plaintiff is entitled to recover damages then the jury may, because of the wilful and wanton nature of the cause of action, give exemplary or punitive damages. The plaintiff, for the purpose of increasing the damages, undertook, as she then properly might, to prove the financial condition of the parties. The plaintiff offered in evidence, and the court admitted, over the objection of the defendant, the will of V. H. Stark, the deceased husband of defendant, together with the order admitting it to probate, the affidavit of one of the subscribing witnesses and the deposition of the other taken to prove the execution of the will. This will gives all the estate of the testator after the payment of his debts to the defendant. It is insisted that the court erred in the admission of the will, the proof of its execution and the order of court admitting it to probate. There was no error in the admission of the will and its probate for the reason it showed that the defendant was the owner of all the estate of her deceased husband subject to the payment of his debts, but there was no reason for admitting the affidavit and deposition of the subscribing witness; they did not tend to prove anything material to the issues in the case.

Plaintiff, by the probate clerk of Vermilion county, identified, "as a part of the records" of the Probate

Court, a paper purporting to be a report made to the Probate Court of Vermilion county by W. J. Bookwalter, as inheritance tax appraiser in the estate of V. H. Stark. There is not in the record any order made by the court or county judge appointing Bookwalter inheritance tax appraiser, or any order of the county judge or County Court approving or confirming the report, neither does the report show that notice was given by such appraiser to the defendant; it only states that the appraiser "gave notice by mail to all the persons known to have a claim and interest in the property of said estate;" that is simply a statement of a conclusion. The defendant was not a party to the making of the report and she was not concluded by anything in it until she was given notice of the assessment by the county judge and it had been approved by the court. The county judge is required by the statute to assess and fix the value of the estate from the report, and upon his making such assessment notice is required to be given to all parties interested and they may then appeal to the County Court. Until the court had acted on the report it was in the nature of a pleading against her by a third party and its admission was error.

Plaintiff also proved over the objection of defendant that she and her husband had two children, one eleven and the other thirteen years of age, and that since her separation from her husband he had not contributed anything to their support and that she had had the care and custody of the children imposed on her. While the statute provides a remedy against a father for abandoning his children under twelve years of age, it does not contain any provision regarding children over that age. If wanton acts of the defendant caused extra difficulty and hardship to the plaintiff, no good reason is urged why she should not recover for such hardships, although the usual measure of damages for a wife in such cases is the

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value of her support and loss of consortium, and for mental anguish and injury to her feelings. 21 Cyc. 1622.

It is also contended that the court erred in giving an instruction that if the jury found for plaintiff, then in assessing her damages the jury had "the right to take into consideration the value of the support which plaintiff has lost, if any, the shame and mortification of plaintiff, if any, the injury to the good name and character of the plaintiff *and her family*, if any, the mental anguish and suffering of plaintiff, if any, and the loss of consortium with her husband, if any, because of the *dishonor to her family*." We are of the opinion that she was entitled to recover for her own injuries but was not entitled to recover for any injury to the good name and character or the dishonor of her family. *Betser v. Betser*, 186 Ill. 537; *Burnett v. Luttrell*, 52 Ill. App. 19; 21 Cyc. 1622.

The giving of exemplary damages was also impressed on the jury by duplicate instructions on that question. Because of the errors pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

The People of the State of Illinois, Defendant in Error, v. Charles Carter, Plaintiff in Error.

(Not to be reported in full.)

Error to the County Court of Champaign county; the Hon. WILLIAM G. SPURGIN, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 5, 1914.

Statement of the Case.

Information by the People of the State of Illinois charging Charles Carter with selling intoxicating

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liquor in the town of Champaign in Champaign county while the same was anti-saloon territory. The information consisted of twenty counts, the only difference between them being the date on which the sales are alleged to have been made. There was a trial before a jury and the defendant was found guilty on the first twelve counts. Motions for a new trial and in arrest of judgment were overruled and judgment imposing a fine and imprisonment was entered on the verdict. To reverse the judgment, defendant brings error.

HERRICK & HERRICK, for plaintiff in error.

LOUIS A. BUSCH, for defendant in error; O. B. DOB-
BINS, of counsel.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 119*—*when date of sales alleged in information immaterial.* The date of sales alleged in an information charging a defendant with selling intoxicating liquors in anti-saloon territory is in no way material, provided the averments and the proof bring the offense within the period of the statute of limitations.

2. INDICTMENT AND INFORMATION, § 45*—*right of defendant to a bill of particulars.* Though a defendant in an information is not entitled to a bill of particulars as a matter of right, the State's Attorney should be required to furnish one where it is made to appear that defendant cannot properly prepare his defense without it. The rule is that the granting of a bill of particulars is within the sound discretion of the court.

3. CRIMINAL LAW, § 473*—*when ruling on question asked of juror on preliminary examination not reviewable.* Action of court in a criminal case in sustaining an objection to a question asked of a juror on preliminary examination, held not to appear erroneous where the record shows that the question was asked among others but such other questions were not in the record, and it does not show but that the question had been answered by the juror in answer to other questions.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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4. JURY, § 80*—*when question asked of jury on preliminary examination is informal.* A question asked of a juror on his preliminary examination whether he would presume the defendant not guilty up to the time the jury arrives at a verdict, *held* informal, since it is the presumption of innocence which the law clothes or accompanies a defendant until verdict.

5. INTOXICATING LIQUORS, § 151*—*evidence sufficient to prove sale in antisaloon territory.* On a prosecution for selling intoxicating liquors in a town which was antisaloon territory, evidence *held* sufficient to show that the town was antisaloon territory at the time alleged in the information, where the People introduced in evidence the record of the town clerk showing the results of an election on the question whether the town should become antisaloon territory and the results of all subsequent elections on the question whether the town should remain antisaloon territory, and the returns in the poll books of the different precincts were also offered in evidence and verified the accuracy of the record made by the clerk.

6. EVIDENCE, § 225*—*when testimony should be excluded as hearsay.* On a prosecution for selling intoxicating liquors in antisaloon territory, testimony of witness who was engaged in a transfer business that his driver had delivered beer at defendant's place of business, *held* improperly admitted for the reason it was hearsay, where it appeared that the witness had never delivered anything to defendant's place of business nor seen anything delivered there.

7. WITNESSES, § 207*—*when extent of cross-examination within discretion of court.* The extent of the cross-examination of a witness as to his previous place of residence and occupation, *held* to be within the reasonable discretion of the court.

8. WITNESSES, § 206*—*when witness cannot be cross-examined.* On a prosecution for selling intoxicating liquor in antisaloon territory, where a witness testified on direct examination only as to his place of residence a week before the trial, and nothing further was asked of him, and the witness on cross-examination answered that he had been promised money for testifying in the case, *held* that an objection to a further question whether he had been offered a certain sum or more for testifying in case defendant was convicted was properly sustained for the reason he had not testified to anything in the case.

9. CRIMINAL LAW, § 553*—*when remarks of counsel prejudicial.* Where a defendant charged with an offense did not testify in his own behalf, conduct of counsel for the People in making a remark to the jury in his argument that defendant "has a right to prove his innocence if he wants to," *held* unprofessional and prejudicial, as be-

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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ing an indirect reference to the fact that defendant had the right to testify in his own defense.

10. INTOXICATING LIQUORS, § 158*—*when instruction in words of statute not error.* The giving of an instruction in the words of that part of section 17 of the Local Option Act, J. & A. ¶ 4653, which prescribes the effect of the insurance of an internal revenue special tax stamps, *held* not error.

11. INTOXICATING LIQUORS, § 158*—*right to instruct as to meaning of prima facie evidence.* In a prosecution for the sale of intoxicating liquor in antisaloon territory, the giving of an instruction which simply told the jury of the meaning and effect of the phrase "prima facie evidence" mentioned in section 17 of the Local Option Act, J. & A. ¶ 4653, *held* not error.

12. INSTRUCTIONS, § 101*—*when erroneous as argumentative and as directing attention to testimony of particular witnesses.* In a prosecution for the sale of intoxicating liquor in antisaloon territory, instructions referring to detectives who testified in the case and telling the jury that they should not "be prejudiced to the extent of disbelieving such witnesses simply on account of such facts," *held* erroneous for the reason they are argumentative and direct the attention of the jury to the testimony of particular witnesses.

13. INSTRUCTIONS, § 101*—*when improper as referring to the credibility of particular witnesses.* In a prosecution for the sale of intoxicating liquor in antisaloon territory, an instruction referring to the testimony of detectives *held* vicious in telling the jury that the evidence of private detectives should be received with care and caution.

14. CRIMINAL LAW, § 287*—*when requested instruction as to jury being judges of the law and evidence improperly refused.* The refusal of a requested instruction: "The jury in a criminal case are, by the statute of Illinois, made judges of the law and evidence; and under these statutes it is the duty of the jury, after hearing the arguments of counsel and the instructions of the court, to act upon the law and facts according to their best judgment of such law and such facts," *held* error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Scott et al. v. O'Hair, 188 Ill. App. 26.

E. L. Scott and W. F. Gaumer, Appellants, v. J. Ogden O'Hair, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Edgar county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914.

Statement of the Case.

Action in assumpsit by E. L. Scott and W. F. Gaumer against J. Ogden O'Hair to recover commissions for services claimed to have been performed by plaintiffs for defendant as real estate agents. The declaration consisted of the common counts, with which plaintiffs filed a bill of particulars: "To commissions in assisting in the exchange of lands of defendant in Edgar county, Illinois, for the lands in the State of Arkansas, and cash \$2,500." The jury returned a verdict in favor of plaintiffs for \$50, and judgment was entered on the verdict. Plaintiffs not being satisfied with the amount of the verdict, appeal.

W. H. CLINTON and F. E. SHOPP, for appellants.

H. S. TANNER and STEWART W. KINCAID, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 92*—*when amount of verdict not against weight of the evidence.* In an action to recover commissions for negotiating an exchange of land for defendant, the amount of a verdict in favor of plaintiffs held not so inadequate as to be against the weight of the evidence, where there was evidence tending to show that plaintiffs were acting in the interest of other parties and not for the

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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defendant, so that they would not be entitled to commissions, and the jury might have awarded the amount of the verdict on evidence of a promise made by defendant to pay plaintiffs something for the expenses incurred.

2. **BROKERS, § 95***—*when instruction supported by the evidence.* In an action to recover commissions for procuring an exchange of defendant's Illinois land for Arkansas land, instructions given for defendant to the effect that if the jury believed plaintiffs were acting as the agents of Arkansas parties in procuring the exchange without disclosing that fact to defendant, the plaintiffs were not entitled to recover, *held* not erroneous for the reason there was no evidence in the record on which to base them, where the preponderance of the evidence tended to show that plaintiffs were endeavoring to sell Arkansas land to defendant and the trade of defendant's land was only an incident to the sale of the Arkansas land.

3. **NEW TRIAL, § 58***—*when inadequacy of damages not ground for.* A new trial for inadequacy of damages will not be allowed on the motion of the prevailing party when, in the judgment of the court, the verdict should have been against him.

SCHOLFIELD, J., took no part in the decision of this case.

John Price, Appellee, v. The Clover Leaf Coal Mining Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Montgomery county; the Hon. JAMES C. MCBRIDE, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 5, 1914. Rehearing denied June 25, 1914.

Statement of the Case.

Action by John Price against The Clover Leaf Coal Mining Company to recover for personal injuries sustained by plaintiff while working as a coal miner in defendant's mine. From a judgment in favor of plaintiff for one thousand five hundred dollars, defendant appeals.

The declaration contains three counts. The first

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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count avers the enactment of the Compensation Act approved June 10, 1911, J. & A. ¶¶ 5449 *et seq.*, that the defendant had elected not to provide and pay compensation according to the provisions of said act, and that defendant thereby was deprived of the common-law defense of assumed risk, fellow-servant and contributory negligence, except that contributory negligence of an employee shall be considered in reduction of damages; that the plaintiff had elected to accept the provisions of said act which entitled him to recover for the injuries sustained; that while the plaintiff was engaged as a miner in a certain cross-cut between certain rooms, a large piece of slate, which had been hanging in the roof for, to wit, a week, the condition of which was or by the exercise of ordinary care would have been known to defendant, without warning, fell upon and injured plaintiff, etc.

The second count contains the further averment that it was the duty of defendant to use reasonable care to furnish the plaintiff a safe place to work, but that disregarding its duty it negligently caused plaintiff to work in said cross-cut, which was not a reasonably safe place, as there was a large, loose and dangerous rock hanging over where plaintiff passed and was employed, the condition of which, by the exercise of due care, was or could have been known to defendant.

The third count avers that defendant was operating a coal mine and in said coal mine was a certain cross-cut where plaintiff was required to pass and work. It pleads the provisions of section 21, of the Miners' Act of 1911, J. & A. ¶ 7495, concerning mine examiners and avers that in said cross-cut where plaintiff was required to work was a dangerous roof and that the mine examiner wilfully failed to place a conspicuous mark thereat, and failed to take up plaintiff's entrance check, and permitted plaintiff to enter the mine and to work during regular working hours under said dangerous roof, and while plaintiff was so employed

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said dangerous rock fell on him, etc. A demurrer which is general and special was overruled, after which defendant filed a plea of not guilty.

The defendant moved for a rule on plaintiff to elect on which count he would rely for a recovery and this motion was overruled. At the close of the evidence plaintiff requested the court to give instructions directing the jury to find the defendant not guilty on each count. These were refused.

The demurrer for special causes states with other reasons that the Compensation Act is unconstitutional and invalid, and that it is not averred that the plaintiff gave notice that he had elected to accept the provisions of the Compensation Act.

The defendant has assigned for error and contends that the court erred (1) in overruling the demurrer; (2) in refusing to require plaintiff to elect on which counts he would ask a recovery; (3) in refusing to direct a verdict of not guilty; (4) that the judgment is contrary to the evidence and excessive; and (5) in the giving of certain instructions.

MILLER & McDAVID, for appellant; D. R. KINDER, of counsel.

HILL & BURLINGTON, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1682***—*when pleading over waives error in ruling on demurrer.* Where a party to an action desires to have an order of court overruling a demurrer reviewed in a higher court he must abide by the demurrer; by pleading over the demurrer is waived.

2. **APPEAL AND ERROR, § 1718***—*when appeal to Appellate Court waives constitutional questions.* A party taking an appeal to the

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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Appellate Court upon assignments of error, which include a ruling on a constitutional question, waives the constitutional question.

3. APPEAL AND ERROR, § 800*—*when ruling on motion to require election of count in declaration not saved for review.* A ruling of the court on a motion to require plaintiff to elect on which count of the declaration he would ask recovery is not saved for review where neither the motion, the ruling of the court nor any exception thereto are preserved in the bill of exceptions.

4. APPEAL AND ERROR, § 565*—*necessity of exceptions to save ruling on motions made preliminary to trial.* Section 81 of the Practice Act, J. & A. ¶ 8618, providing that a formal exception is not necessary to save for review rulings on questions during the progress of the trial, has no application to motions made preliminary to the trial, such as motions for a continuance or motions to require plaintiff to elect on which count in the declaration he will ask recovery.

5. APPEAL AND ERROR, § 800*—*when rulings on motion must be preserved by bill of exceptions.* Rulings on motions preliminary to a trial, which are not a part of a common-law record, must be preserved by a bill of exceptions.

6. PLEADINGS, § 58*—*when plaintiff not required to elect between counts.* Denial of a motion to require plaintiff to elect on which count in the declaration he will ask recovery, *held* not error where all the counts are based on the same state of facts.

7. ACTION, § 41*—*when not a misjoinder of causes of action.* There is no misjoinder of causes of action in several counts of the declaration where all the counts are based on the same state of facts.

8. ACTION, § 44*—*when plaintiff not required to bring separate actions.* Where a defendant is liable to plaintiff for personal injuries in an action at law either under section 21 of the Miners' Act, J. & A. ¶ 7495, or in an action at law as modified by other provisions of the statute, the plaintiff should not be required to bring separate actions based on the same facts.

9. WORKMEN'S COMPENSATION ACT, § 5*—*when count in declaration based on Workmen's Compensation Act defective.* A count in a declaration to recover for personal injuries which pleads the Compensation Act of 1911, J. & A. ¶¶ 5449 *et seq.*, and avers simply that plaintiff was injured in the course of his employment without averring the failure to perform any duty which defendant owed to plaintiff, or any negligence or carelessness on the part of the defendant, *held* not to be a good count where the defendant had elected not to come under the act.

10. WORKMEN'S COMPENSATION ACT, § 2*—*Workmen's Compensation Act construed.* Sections 3 and 10 of the Workmen's Compensation Act construed.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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tion Act of 1911, J. & A. ¶¶ 5451, 5459, apply only to cases where both parties have accepted the provisions of the act.

11. WORKMEN'S COMPENSATION ACT, § 2*—*right of employee to recover under Workmen's Compensation Act where employer refused to accept provisions of act.* Where an employer has refused to accept the provisions of the Workmen's Compensation Act of 1911, he thereby waives his defenses of assumed risk, fellow-servant and contributory negligence, and an employee who has not refused to accept its provisions may maintain an action against his employer for injuries received by him freed from said defense, if it is averred that the injuries were caused by the negligence of the employer and the evidence sustains the declaration subject only to the provision that contributory negligence shall be considered in reducing the amount of damages.

12. MINES AND MINERALS, § 182*—*when question relating to examination of mine is for jury.* In an action to recover for injuries sustained by a miner from the fall of a stone from the roof of the mine, where it was alleged that the mine examiner failed to mark the dangerous condition of the roof, *held* under the evidence it was a question for the jury whether the examination was of the kind contemplated by statute and whether the roof at that time was safe or was in fact dangerous.

13. MINES AND MINERALS, § 187*—*when instruction based on counts in declaration erroneous.* In an action to recover for personal injuries received by plaintiff in defendant's mine, an instruction telling the jury that if they find that the evidence bearing on plaintiff's case, as alleged in his declaration or in either count thereof, preponderates in his favor although but slightly it will be sufficient to warrant a finding for plaintiff, *held* erroneous where one of the counts was defective in failing to aver any negligence.

14. WORKMEN'S COMPENSATION ACT, § 2*—*when instruction stating language of Compensation Act misleading.* An instruction stating the provisions of section 1 of the Workmen's Compensation Act, J. & A. ¶ 5449, *held* misleading in so far as it states that part of the section preceding the portion which states the penalties imposed for refusal of employer to accept the provisions of the act.

15. MINES AND MINERALS, § 189*—*when instruction in language of Miners' Act not misleading.* The giving of an instruction in the language of paragraph "b" of section 21 of the Miners' Act, J. & A. ¶ 7495, *held* not misleading though parts of it had no application to the case.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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**William D. Barnes, Appellee, v. A. C. Barnett et al.,
Appellants.**

1. **EXCHANGE OF PROPERTY, § 8***—*when fraud in inducing exchange of land.* In an action for fraud and deceit practiced on plaintiff to induce him to make an exchange of his land, the undisputed evidence *held* to conclusively prove a conspiracy on the part of defendants to defraud the plaintiff.

2. **FRAUD, § 20***—*when statements concerning land not expression of opinion.* Statements made concerning the value of land, the price of adjoining land, that the land had no hard pan under it, that could easily be tilled and that there had been a large loan made on it, *held* to be statements of material facts and not expressions of opinion.

3. **VENDOR AND PURCHASER, § 39***—*when purchaser entitled to recover for fraud and deceit.* Where artifice and fraud are used to prevent a purchaser from inquiring about or making an examination of the land, the fact that the vendor has examined the land does not destroy his right to recover for fraud and deceit.

4. **RELEASE, § 21***—*when contract does not constitute.* Where a plaintiff, who had been fraudulently induced by the defendants to exchange his land for other lands, entered into an agreement with the heirs of defendants' grantee of plaintiff's land whereby the plaintiff agreed to surrender his possession of the land in consideration of \$2,000, with a certain reservation of the right to litigate the rights of plaintiff and defendants in the lands, *held* that the agreement did not constitute a release of defendants in a suit against defendants for fraud and deceit in inducing plaintiff to make the exchange.

5. **EXCHANGE OF PROPERTY, § 8***—*admissibility of evidence.* In an action for fraud and deceit in inducing plaintiff to exchange his land for Missouri land, evidence offered by defendants to prove the value of plaintiff's land *held* inadmissible for the reason it was immaterial and not relevant to the issues in the case where the only question was whether there was fraud and deceit in the conveyance of the Missouri land.

6. **RELEASE, § 29***—*sufficiency of instruction on effect of contract.* In an action for fraud and deceit in inducing plaintiff to make an exchange of lands, an instruction given for plaintiff which told the jury that a certain contract between plaintiff and the heirs of defendant's grantee of plaintiff's land "is not a release of a joint tortfeasor" and that it should be considered by them only as evidence on the question whether defendants are guilty of fraud and misrep-

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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resentation, *held* not subject to the criticism that it is peremptory in its nature and withdraws from the jury a part of the facts in the case, but *held* erroneous in telling the jury that they should consider the contract as evidence on the question of fraud.

7. APPEAL AND ERROR, § 1779*—*when errors in instruction not ground for reversal.* The Appellate Court will not reverse for errors in instruction not raised by appellants.

8. EXCHANGE OF PROPERTY, § 8*—*measure of damages in action for false representations.* In an action for fraud and deceit practiced on plaintiff to induce him to exchange his land for Missouri land, an instruction telling the jury that if plaintiff was entitled to recover he would be entitled to the difference between the value of the Missouri land as it was at the time of the sale and what it would have been worth if the representations of defendant had been true, with interest at five per cent., *held* to state the correct measure of damages.

9. APPEAL AND ERROR, § 1011*—*when improper remarks of counsel not saved for review.* Improper statements of counsel in his argument to the jury, not saved for review where the trial judge has not certified to any statements of counsel and there is no exception to any of his statements.

10. APPEAL AND ERROR, § 1011*—*method of saving improper remarks of counsel for review.* The question of whether or not improper or prejudicial argument was made to the jury cannot be saved by *ex parte* affidavits; the statements must be certified to by the trial judge in the bill of exceptions.

11. NEW TRIAL, § 67*—*when newly-discovered evidence insufficient to constitute ground for.* Newly-discovered evidence is insufficient as ground for a new trial where it is only cumulative and in the nature of impeaching evidence and would have not changed the verdict.

PHILBRICK, J., took no part in the decision of this case.

Appeal from the Circuit Court of Champaign county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914. Rehearing denied June 25, 1914. *Certiorari* denied by Supreme Court (making opinion final).

L. B. SAFFER and JOHN J. REA, for appellants.

ROBERT P. BURKHALTER and DOBBINS & DOBBINS, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an action on the case, brought by William D. Barnes against A. C. Barnett, George P. Bliss, A. R. Scott and James E. Sunderland to recover damages for fraud and deceit averred to have been practiced on the plaintiff by the defendants in the exchange of real estate.

The case was tried upon the second amended count of the declaration which avers that in May, 1909, the plaintiff was the owner of certain described real estate, consisting of 494 acres in Champaign county, Illinois, and 320 acres in Walsh county, North Dakota; that it was agreed between plaintiff and defendants that all said real estate was of the fair cash value of over \$60,000 above all incumbrances and liens thereon and that the defendants conspired together to cheat and defraud plaintiff out of his said real estate and to exchange therefor certain described real estate in the county of St. Charles, Missouri, which they knew to be worth not more than \$24,500, by fraudulently inducing the plaintiff to accept said real estate and pay therefor the sum of \$70,350, subject to an incumbrance thereon of \$24,500, in exchange for his equity in said lands in Illinois and North Dakota. The count pleads certain acts of the defendants in furtherance of the alleged conspiracy, and further avers that defendants induced the plaintiff to visit the Missouri land for the pretended purpose of appraising wheat growing thereon and that they afterwards kept plaintiff under their control and represented to him that the Missouri land was of the value of \$70,000 and that an insurance company had loaned \$16,000 thereon, when the said land was worth not to exceed \$22,000 and the mortgage on it was \$6,500; that the land could not be purchased for less than \$200 per acre when in fact it could be bought for \$60 per acre, and that plaintiff was not familiar with the value of farm lands in Mis-

souri, which was known to defendants; that defendants knew the representations made by them were false and that plaintiff relying on such representations conveyed his land to A. C. Barnett at an agreed price of \$123,000 and was fraudulently induced to purchase said Missouri land and pay therefor the sum of \$70,350, and to assume an incumbrance of \$16,000 and to execute a mortgage thereon to said Barnett for the sum of \$8,500, which said incumbrances were more than the value of said Missouri land, to the damage of appellee of \$60,000.

The defendants filed three pleas; (1) The general issue, (2) a plea of former adjudication and (3) a plea of release which avers that plaintiff had accepted \$2,000 from the heirs of S. T. Busey, deceased, in full of all damages arising out of said transaction. Issue was joined on the general issue and replications filed denying the special pleas, and on these issues were joined.

On a trial before a jury a verdict in favor of plaintiff for \$58,168.54 was returned against all the defendants on which judgment was entered, and Bliss, Scott and Sunderland prosecute this appeal.

It is contended that the judgment cannot be sustained on the evidence and that the judgment is excessive. The record disclosed that appellee, in 1909, was a bachelor farmer of the age of sixty-six years living on a farm consisting of 280 acres near Gifford, Illinois, in Champaign county, on which were various mortgages, the principal of which amounted to \$37,400. About a year prior to that time he had bought another farm of 214 acres near Bondville, in the same county, known as the John F. Busey farm. At the time he purchased the Busey farm he gave a mortgage to Busey for \$30,000 covering both his Illinois farms. There was also a mortgage of \$5,000 on his Dakota land. He was also indebted on some judgment notes, which he had given in the purchase of some oil stocks. Appellants Scott and Sunderland are partners and real

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estate agents having offices in the city of Champaign. It was through their agency that appellee bought the Busey farm. Appellee had, early in 1909, placed the Busey farm and his Dakota land in the hands of Scott and Sunderland for sale fixing the price on the Busey farm at \$225 an acre, telling them he wanted to sell it as interest was eating him up. Appellant Bliss is in the real estate brokerage and abstract business in the city of Urbana and advertised that he dealt in southern timber land. Sunderland and appellee had been raised in the same neighborhood and had been acquainted with each other for many years. Scott, Sunderland and Bliss appear to have been well acquainted with appellee's financial affairs.

Defendant Barnett, who does not appeal, is an attorney residing at McLeansboro, Illinois, and his business appears to be dealing in real estate. In February, 1909, Bliss wrote to appellee telling him that he had better get out of debt and trade his farm for a farm in the south. Later he again wrote appellee informing him that judgments had been entered against him on some notes, and that he had better look out for executions against his corn and other personal property. Appellee did not answer these letters. In February, 1909, Bliss began correspondence with an abstracting firm composed of Ben L. Emmons and Ben L. Emmons, Jr., at St. Charles, about twenty miles from St. Louis, Missouri, stating that he wanted some options on some Missouri lands and inclosing some blank forms of options, which he stated in his letter would "draw blood in a suit in chancery for specific performance." The letter further states: "I have exchange contracts which I enclose and agreement for deed that also makes the attorney for defendant scratch his head some."

The record does not disclose how Barnett first became connected with the transaction involved in this case, further than that he testified that he had had

some conversation with Scott and Sunderland about trading some property he was about to acquire with some of their customers, and that the first time he saw appellant about this trade was May 13, 1909. However, on April 20, 1909, he had written to appellee from Urbana on the stationery of Bliss that he was in Urbana, and wanted appellee not to fail to come and see him. Appellee did not answer this letter. Barnett next appears in St. Charles, Mo., at Emmons' office, where he represented himself as an attorney representing Col. Busey and Bliss, and proved that he represented Bliss by showing the correspondence between Emmons and Bliss with reference to the option. At Emmons' office he desired to be shown some farms on which options could be secured. Before this time, but when the evidence does not disclose except that it was before any talk was had with appellee about the trade that was subsequently made, there had been an arrangement made between Bliss, Scott, Sunderland and Barnett that they were each to have twenty-five per cent. of the profits made in any deal with appellee. All the appellants and Barnett testified to such an agreement.

After looking at various farms Barnett was shown the Perly Reynolds farm of 339 acres lying near the Mississippi river. Reynolds had only owned this farm two months. Barnett asked Reynolds the price of the farm and Reynolds told him \$65 an acre. Barnett secured an option on this farm to Emmons bearing date May 8, 1909, giving him the right to take the farm at \$22,000, which only bound Emmons for the payment of \$1 for the option. By the terms of the option Emmons had the right to assume a mortgage for \$6,500 on the farm and give a second mortgage for \$4,000 as part of the purchase money and the deed was to be made to Emmons or his assigns or to any person he might elect. This option has written on it an assignment dated May 12th from Emmons to Bliss and on the same date an assignment from Bliss to Barnett.

After this option had been secured Barnett informed Emmons that Scott and Sunderland would be down with a buyer the next day, and asked him to arrange for a conveyance, preferably an automobile, to take them to see the farm and told Reynolds "to go duck hunting the next day" as "they were going to show the farm to a prospective buyer, and they thought it best that he be away, as they did not want the buyer to talk with the owner." Barnett then left for St. Louis. Emmons testified that Barnett asked him to telephone to a certain hotel in St. Louis as soon as Scott and Sunderland started to return to St. Louis with the prospective buyer, this however is denied by Barnett.

Appellee was induced by Sunderland to go to St. Charles on May 13th and look at the Reynolds land, but there is a conflict in the evidence as to the purpose for which he went there. Appellee testified that Sunderland came to his farm near Gifford when he was burning brush on the side of the road and said to him, "Hello Billy, I got a buyer for your land." Appellee said, "That's nice, when are going to show it," and Sunderland replied, "Well, I want you to go to Missouri and estimate a piece of wheat for me." And arrangements were made to go to St. Charles. Sunderland testified that appellee had told him he wanted to sell or trade all his land in Illinois and Dakota, and that about May 10th, at appellee's farm near Gifford where he was burning brush, he, Sunderland, said to appellee that he knew a party that had 340 acres in Missouri that he held at \$210 an acre who would entertain a trade for appellee's land, and appellee said he was very busy but would go down the next day and look at it. Appellee and Sunderland went to St. Louis on May 12th, stayed at the Majestic hotel all night and the next morning went to St. Charles, where it was raining hard and they went to a hotel. Sunderland then went to get a rig to drive out to look at the farm,

as he says, and at the wheat, as appellee says, and returned with a surrey with Scott and Emmons, Jr., in it. Appellee greeted Scott, "Hello, Scott, you down here, what are you doing here?" and Scott replied he was there on business and appellee replied, "I didn't expect to meet you here." Appellee testified Scott asked him if he would go out and estimate the wheat. Sunderland, Scott, Emmons and appellee drove to the Reynolds farm about six miles from town and on the way appellee's attention was called to a field of alfalfa. After arriving at the Reynolds farm they did not enter either of the houses on it, nor did appellee see Reynolds, or appear to pay any attention to the quality of the land although Scott got out of the surrey at one place and got a handful of soil and showed it to appellee and called his attention to some clover and the drainage. Scott endeavored to show appellee how the farm would drain and appellee suggested that drainage would depend on whether there was hard pan in the soil and Scott replied there was no hard pan in that country. The evidence shows that there is an impervious clay, which is hard pan, under the farm. Appellee stated to those with him that he would be surprised if the wheat turned out twenty bushel to the acre and did not get out of the rig while on the farm except in the barn into which they drove because of the rain. The evidence shows that the land in St. Charles county which lies in the Mississippi slope is what is known as "Black Stick" or "gumbo" and is hard pan land and that it is not worth over \$40 to \$60 an acre, while the land on the Missouri slope is a sandy loam, fertile and readily sells at from \$200 to \$300 an acre. On the way back to St. Charles, Scott and Sunderland called appellee's attention to various farms. Scott pointed out a farm called the Nippenberger farm, and said a man had paid \$100 an acre for a half interest in it a few days previous, when as a matter of fact he had only paid \$50 an acre, and various other

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farms were pointed out as worth from \$250 to \$400 an acre which could have been bought for a third of the price named by Scott.

It is also shown by the evidence that a deed of the Reynolds farm to Barnett was executed and placed in escrow the day before appellee visited the farm and that the day the deed was made Scott went to the telegraph office to send a message to some person.

When Scott and Sunderland with appellee started on a car back to St. Louis, Emmons telephoned to the Majestic Hotel, as he testified he had been requested by Barnett to do, that they had started for St. Louis, and Scott, Sunderland and appellee met Barnett as soon as they arrived back in St. Louis. Scott and Sunderland appear to have kept appellee in their company until they arrived back in Champaign, and in Champaign Scott took appellee with him to his hotel or rooming house and the next morning, May 14, 1909, he with Scott and Sunderland went to the office of Bliss, where Barnett shortly appeared and a written contract, witnessed by all appellants was entered into for the conveyance of all appellee's lands to Barnett, reserving to appellee the possession of the 280 acre farm near Gifford until March 1, 1910, and of the Reynolds farm to appellee. At the same time appellee executed and delivered a deed conveying to Barnett all his land in Illinois for the consideration of \$106,447, subject to all indebtedness of record against it, and a deed of the Dakota land for the consideration of \$16,000 subject to the \$5,000 mortgage on it. The deed of the Illinois land to Barnett was recorded May 14th.

On the same day Barnett made a deed of the Reynolds land to appellee for the consideration of \$70,350, subject to present mortgage indebtedness not to exceed \$16,000. This deed was acknowledged before appellant Bliss, who was a notary public, but was held by Bliss about a month, until some other trust deeds in

addition to the \$6,500 already on this land could be placed upon it and recorded. A few days before May 14, 1909, Barnett with Bliss went to S. T. Busey, a wealthy resident of Champaign, and told him he was about to buy some land which he expected to trade to appellee and wanted to borrow \$9,000. On June 14th, Barnett made a deed of trust on the Reynolds land to Ben Emmons, Jr., securing four notes, each for the principal sum of \$2,000 and interest at six per cent. per annum. This trust deed was recorded June 15th at 11 A. M. The deed of the Reynolds land to Barnett was not recorded until after appellee executed a trust deed on that land to S. T. Busey, trustee for Barnett, securing a note for \$8,977 to Barnett which was assigned by him before this suit was begun. This trust deed was recorded June 15th at 12 M. Appellee did not receive any money on this trust deed, but it was received by Barnett and used by him with three of the notes to Emmons and with \$500 realized on the other note to Emmons, which had been discounted at a bank, to pay the purchase money due Reynolds above the \$6,500 mortgage on the land. There is evidence that Bliss told appellee that Col. Busey was the purchaser of his Illinois land and that it was Busey's way of doing business to have the title go through a third party. The record of the evidence is very voluminous and while there is much contradictory evidence we do not deem it necessary to review it at further length.

The prominent undisputed facts conclusively prove a conspiracy on the part of appellants and Barnett and show a very clear case of fraud and deceit on the part of appellants with Barnett to defraud appellee in the conveyance to him of the Reynolds land. Neither Barnett nor appellants had any real interest in the Reynolds land when the contract was made with appellee; all they had was an option to buy it at \$22,000. Before delivering the deed to appellee they had it mortgaged in the sum of \$23,477, which includes the

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\$6,500 on it before they procured the option. The mortgages amounted to more than its value.

Appellee got nothing for his Illinois and Dakota land. The appellants knew that appellee was ignorant of the value of the Missouri land and so maneuvered with appellee that he would not discover the fraud that was being perpetrated on him.

Appellants deliberately and falsely stated the value of the land conveyed to appellee; they falsely stated to him the selling price of adjoining lands; that the land was a sandy loam; that there was no hard pan under it; that it could easily be tilled and that there had been a loan of \$16,000 on it. These were material facts and not expressions of opinion. *Hughes v. Lockington*, 221 Ill. 571; *Douglass v. Treat*, 246 Ill. 593; *Leonard v. Springer*, 197 Ill. 539. Where artifice and fraud are used to prevent a purchaser from inquiring about or making an examination of the land, the fact that the vendor has examined the land does not destroy his right to recover for fraud and deceit. *Hughes v. Lockington*, *supra*. Appellee was not a resident of the locality where the land was located and he had a right to rely on the representations of appellants. *Ladd v. Pigott*, 114 Ill. 647; *Wenegar v. Bollenbach*, 180 Ill. 222. Appellee was induced by the fraud of appellants to take it at \$210 per acre. Reynolds only asked \$65 an acre and the evidence shows it was worth less than the option price. Even at \$65 an acre appellee was defrauded out of \$48,575, which with interest to the time of the trial would make the verdict and the judgment for the correct amount.

There is no evidence whatever in support of the second plea or that the matters in controversy here were ever involved in any other suit.

A bill in chancery by appellee against the heirs of S. T. Busey, Mrs. Busey, appellants and Barnett was prepared to be filed, but never filed, for a cancellation of the deeds made by appellee to Barnett and a deed made by Barnett conveying the same land to Busey.

This bill was never filed but on December 3, 1909, an agreement was made between Mrs. Busey and appellee by which in consideration of \$2,000 paid by Mrs. Busey to appellee he should surrender to Mrs. Busey possession of the farm near Gifford, the possession of which to March 1, 1910, had been reserved to appellee in the contract of May 14th, and that all the lands originally owned by appellee should be sold at not less than certain stated prices within one year from the date of the agreement, and after the moneys due the Busey estate should be paid the balance of the moneys received should be held subject to the claims of Bliss, Scott, Sunderland, Barnett and one George M. Thompson, who was the attorney for appellee. This was a contract to hold in escrow the proceeds of the sale of the lands until the right of the parties should be settled by litigation. No fraud is charged against Busey, and the payment of the \$2,000 for the possession of the land, with the reservation of the right to litigate the rights of appellee and appellants in the lands or the proceeds thereof, cannot be a release of appellants in a suit for fraud and deceit as is claimed under the third plea.

It is contended that the court erred in refusing to permit appellants to prove the value of the lands conveyed to Barnett by appellee.

There was no issue before the court on that question, the only question was the fraud and deceit in the conveyance of the Reynolds land to appellee. The evidence offered was immaterial and not relevant to the issues in the case for the reason the averment with the proof is that appellants took appellee's land at an agreed price concerning which there is no allegation of fraud. *Drew v. Beall*, 62 Ill. 164; *Stanhope v. Swafford*, 80 Iowa 45; *Matlock v. Reppy*, 47 Ark. 148; *Hecht v. Metzler*, 14 Utah 408, 60 St. Rep. 911.

Appellants contend that the fourth instruction given for appellee was erroneous "as it is peremptory in

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its nature and withdraws from the jury part of the facts in the case.” This instruction told the jury that the contract between plaintiff and the heirs of S. T. Busey “is not a release of a joint tort feisor” and that it should be considered by the jury only as evidence on the question of whether defendants are guilty of fraud and misrepresentation. The instruction was only peremptory in telling the jury that it was not a release of appellants. It was the right and duty of the court to construe the agreement, and the court did not err in the particulars contended for by appellants for the reason there is not a shadow of evidence tending to show that Busey was a joint tort feisor and the agreement is not a release of any person. The instruction, however, was erroneous in telling the jury that they should consider it as evidence on the question of fraud. It was a transaction *inter alios* and not proper to be considered on the issue of whether appellants were guilty of fraud, but the appellants have not raised any question over that part of the instruction and an Appellate Court should not reverse for reasons not raised by appellants.

It is also stated on behalf of appellants that the instructions on the measure of damages given at the request of appellee are erroneous, but it is not pointed out in what way they are erroneous. The instructions told the jury that if plaintiff was entitled to recover he would be entitled to the difference between the value of the Missouri land, as it was at the time of the sale and what it would have been worth if the representations made by the defendants had been true, with interest at five per cent. This is the correct measure of damages as announced in *Schwitters v. Springer*, 236 Ill. 271.

It is also contended that the case should be reversed because of statements made by counsel for appellee in his closing argument to the jury. The trial judge has not certified to any statements made by counsel,

neither is there any exception to any statements of counsel. There are incorporated in the record contradictory affidavits made by appellants and by counsel for appellee as to what was said in argument. The trial court does not certify which, if either, is correct. The question of whether or not improper or prejudicial argument was made to a jury cannot be saved by *ex parte* affidavits. The statements made must be certified to by the trial judge in the bill of exceptions. *Peyton v. Village of Morgan Park*, 172 Ill. 102; *Mayes v. People*, 106 Ill. 314; *People v. Nall*, 242 Ill. 284.

Appellants contend that a new trial should have been granted because of newly-discovered evidence. The newly-discovered evidence as set forth in the affidavits filed is only cumulative and in the nature of impeaching evidence. It would not have changed the verdict and was not of sufficient importance to have required the granting of a new trial.

Finding no reversible error the judgment is affirmed.
Affirmed.

MR. JUSTICE PHILBRICK took no part in the decision of this case.

John M. Jones, Appellee, v. August Minks, Appellant.
(Not to be reported in full.)

Appeal from the Circuit Court of Champaign county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 5, 1914. Rehearing denied June 25, 1914.

Statement of the Case.

Action by John M. Jones against August Minks on six judgment notes after a judgment by confession, entered in vacation in the office of the circuit

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clerk, had been opened up with leave to defendant to plead to the declaration. Defendant, after filing certain pleas claimed not to be material to the issues before the Appellate Court, filed two additional pleas, the first averring a failure of consideration as to all the notes except the sixth and the other averring failure of consideration as to the other note. At the close of defendant's evidence the court excluded it and directed the jury to find in favor of plaintiff for the full amount of all the notes. Thereupon an order was entered vacating the order opening up the judgment, and it was further ordered that the original judgment remain in full force. To reverse the judgment, defendant appeals.

The only questions raised on the appeal concern the sustaining of an objection to certain evidence offered by defendant and the giving of the peremptory instruction.

The facts show that appellee, Jones, is a local agent of the International Harvester Company and that appellant is a tenant farmer; that agents of the Harvester Company induced appellant to purchase a gasoline tractor and plow upon representations that the tractor had the same power as a 28 horse power steam engine, that it used a gallon of gasoline per horse power per day of ten hours, that it would pull eight plows plowing ten inches deep and was better than a steam engine for running a threshing machine.

The contract for the purchase of the tractor was in writing and contained a clause that appellant purchased the same subject to the conditions printed on the back. The warranty has several lengthy and involved conditions attached to it and provides among other things:

“INTERNATIONAL HARVESTER COMPANY OF AMERICA (Incorporated) hereby warrants said thresher, attachments and engine to be well made, of good material, and durable with proper care, and to

do good work if properly operated by competent persons, with sufficient power, and the printed rules and directions of the manufacturer intelligently followed. If, after three days' trial by the purchaser said property shall fail to fulfill the warranty, written notice thereof shall at once be given to said company at Harvester Building, Chicago, Illinois, and also to the agent through whom the same was purchased, stating wherein it fails to fulfill the warranty, and reasonable time shall be allowed said company to send a competent man to remedy the difficulty, the purchaser rendering necessary and friendly assistance. Said company reserves the right to replace any defective parts, and, if then the machinery cannot be made to fulfill the warranty, the part that fails is to be returned by the purchaser, free of charge to the place where received and the company notified thereof, and, at the company's option, another substituted therefor that shall fill the warranty, or the notes and money for such part immediately returned, or the amount credited on the notes that have been given, and no further claim shall be made on said company.

Failure to make such trial, or to give notice as herein provided, shall be conclusive evidence of the fulfillment of the warranty, and the company shall be released from all liability," and "that no representations made by any person as an inducement to give and execute the within order shall bind the company," and "This express warranty excludes all implied warranties * * *."

Appellant contends and by his pleas avers that the agents of the Harvester Company fraudulently and deceitfully made the following untruthful representations to him as an inducement to him to purchase its tractor: (1) That the upkeep and maintenance of the tractor was less than the upkeep and maintenance of a steam engine of like power; (2) that the gasoline tractor would do the same work a steam tractor would

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do fully as satisfactory and at less cost; (3) that the gasoline engine was more easily handled than a steam engine; (4) that the gasoline tractor would operate on a gallon of gasoline per horse power per day of ten hours; (5) that the gasoline tractor would pull eight plows plowing ten inches deep and would also pull a harrow and drag after it; and (6) that the gasoline tractor would operate a sheller and separator as satisfactorily as would a steam traction engine.

LEFORGEE, VAIL & MILLER, for appellant.

DOBBINS & DOBBINS and GREEN & PALMER, for appellee; O. BARTH, of counsel.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 326*—*when parol evidence admissible to show fraudulent inducement in suit on note given for purchase money.* In an action by a seller against the purchaser on notes given by the latter as a part of the purchase price for an article sold to him by the seller, where the defendant filed pleas of failure of considerations in the nature of pleas of fraud and deceit, in that the defendant was induced to execute the contract of sale by false and fraudulent representations as to the nature and value of the article sold, *held* that parol evidence was admissible to show the alleged fraud and deceit, though there was a clause in the contract of sale excluding all implied warranties and providing that no representations made by any person as an inducement to execute the contract shall bind the seller.

2. SALES, § 314*—*when defense of fraud in inducing sale available.* The existence of an express written warranty does not exclude a defense based on fraudulent misrepresentations inducing the sale.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Lewis v. Drainage Com'rs of Drain. Dist. No. 1, 188 Ill. App. 49.

Joseph Lewis, Appellee, v. Drainage Commissioners of Drainage District No. 1 of the Town of Young America, Appellants.

1. APPEAL AND ERROR, § 932*—*how bill of exceptions may not be amended.* A bill of exceptions cannot be amended in the Appellate Court by affidavits.

2. APPEAL AND ERROR, § 784*—*language of bill of exceptions.* It is immaterial whether the language of the bill of exceptions is in the present or past tense.

3. TRIAL, § 295*—*when propositions of law must be submitted.* Propositions of law not presented until after the court has announced its decision may be properly refused.

4. TRIAL, § 296*—*duty of court to consider propositions of law.* The number of propositions of law is no legal reason for refusing to pass on them; when they are properly presented the court should pass on a sufficient number of them to cover all legal questions in the case.

5. APPEAL AND ERROR, § 1725*—*when decision on former appeal not res adjudicata.* A decision of the Appellate Court on a former appeal is not *res adjudicata* on a subsequent appeal where the issues on the last trial were entirely different from those on the first.

6. DRAINAGE, § 51*—*when recovery for work in cleaning ditch sustained by the evidence.* In an action against drainage commissioners to recover for services rendered by plaintiff in repairing and cleaning out a drainage ditch, alleged to be a branch in the system of defendants, evidence held sufficient to sustain a finding and judgment in favor of plaintiff.

Appeal from the Circuit Court of Edgar county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914. Rehearing denied June 25, 1914. *Certiorari* denied by Supreme Court (making opinion final).

H. S. TANNER, CHARLES G. ECKHART and GREEN & PALMER, for appellants.

FRED RHOADS, JAMES W. & EDWARD C. CRAIG and DONALD B. CRAIG, for appellee; FRANK J. O'HAIR, of counsel.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an appeal by the Drainage Commissioners of Drainage District No. 1 of the Town of Young America, Edgar county, Illinois, from a judgment in favor of appellee for \$4,828.85, recovered for services performed by appellee in repairing and cleaning out a drainage ditch known as "The Gilkey Branch" in a system of drainage averred to be part of the system of appellants.

The bill of exceptions recites that "upon the completion of the evidence in this case and after both the plaintiff and the defendant had rested their respective cases, the court announced that each party would have one hour for argument of the said case; and be it further remembered that thereupon the said case was argued by the attorneys for the respective parties, and that after the arguments of counsel had been completed the Judge of said court began to announce his finding and decision in reference thereto and announced that his finding would be in favor of the plaintiff and thereupon, after the announcement of the said finding and during the delivery by the court of his reasons for said finding, the defendant offered the propositions of law hereinafter referred to in his bill of exceptions and the Judge of said court announced, when the same were offered, that they were offered too late and also announced that the number of the propositions of law were too great to be considered, and he would not consider them in any way as they were not argued or referred to in the argument and announced that he would mark them all refused without reading the same, because they were too numerous and wholly exceeded in number, propositions of law that were necessary for the decision of this case; and thereupon the Judge of the said court without reading the said propositions of law or any of them, and without considering the same in any way, for the above and foregoing reasons

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marked each and all of the said propositions 'refused' as follows * * *." The foregoing is followed by thirty-seven proposition of law, all of which are marked "refused" and which extend over twenty-nine pages of the record.

Appellants have attempted in this court to amend the bill of exceptions by changing the phrase "the Judge of said court began to announce his finding and decision in reference thereto and announced that his finding would be in favor of the plaintiff." The only change they insist should be made is that the last-quoted sentence "is in the past tense and in recitative form and not in the present tense nor in the language used in court records." A bill of exceptions cannot be amended in an Appellate Court by affidavits. The question whether the bill of exceptions fully and fairly represents the facts occurring in the presence of the trial court is confided to his judgment and his decision is final. *Dreyer v. People*, 188 Ill. 40; 3 Encyc. of Pl. & Pr. 446. It is also material whether the language of the bill of exceptions is in the present or past tense, and were it couched in the present tense it would not be of any advantage to appellants.

It is apparent from the bill of exceptions and the affidavits of counsel for appellant, if we are at liberty to refer to them, that counsel for appellants were in court with an unnecessary and unreasonable number of propositions of law, prepared to present them to the court and ask a ruling thereon, if the court should decide against them, and to withhold them if the court should decide in their favor. Section 61 of the Practice Act as amended in 1907 (J. & A. ¶ 8598), provides: "Upon a trial by the court either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write 'refused' or 'held,' as he shall be of opinion is the law, or modify the same, to which either party may except as to other

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opinions of the court. In any case so tried the court shall find specially upon any material question or questions of fact which shall be submitted in writing by either party before the commencement of the argument."

The record does not show that there is any rule of the Circuit Court of Edgar county fixing the time in which propositions of law are to be presented. It is apparent that before any offer was made to present the propositions of law to the court that the Judge had announced his findings and what his judgment would be, and was giving his reasons for his findings and judgment before appellants desired and made any attempt to present their propositions. The object and purpose of presenting propositions of law is to aid the court in arriving at a correct conclusion and proper judgment in cases tried by it without a jury. They can serve no useful purpose unless they are presented to the trial court "before the decision is rendered." "If they can be submitted at any time after such final decision they would not only cease to serve any useful purpose, but would become a hindrance, rather than an aid, to the speedy administration of justice. If such a practice should be allowed, no one but the defeated party would ever submit any such written propositions to the court, and such party would prepare and submit them, not for the purpose of aiding the court in coming to a correct conclusion, but, in the light of the decision already rendered, would do so in order to provide himself with a lever to overturn the judgment on appeal." It would correspond with a request to the court to pass upon instructions tendered after verdict. *Allman v. Lumsden*, 159 Ill. 219. The propositions should be submitted before any intimation from the court as to what the decision will be. *Mann v. Learned*, 195 Ill. 502; *American Cent. Ins. Co. v. Henninger & Co.*, 87 Ill. App. 440.

The number of the propositions presented is no legal reason for refusing to pass on them. When they

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are properly presented the court should pass on a sufficient number of them to cover all legal questions in the case. The record showing that the propositions were not presented before the court had announced his decision, there was no error in refusing them.

This is the second appeal of this case to this court. The opinion on the former appeal containing a statement of the facts as they then appeared is in 161 Ill. App. 570. The case was reversed because of error in sustaining a demurrer to two special pleas. It is now contended that the judgment of this court on the first appeal is "*res judicata*" not only to the questions of fact and of law which were decided in the former suit but also to the grounds of recovery or defense which might have been but were not presented. The pleas to which it was held a demurrer was erroneously sustained averred, in substance, that the work done under the contract sued on was not done on a ditch which was a part of the system of appellants, but was the ditch of a subdistrict, known as District No. 4, in Young America Township, organized under section 43 of the Farm Drainage Act (J. & A. ¶ 4520) for the purpose of local or more minute drainage and emptying into the ditch of appellants. To these pleas, after the case was remanded, the appellants filed replications that the ditch cleaned out was a part of the original system of appellants as adopted and determined upon in the original plan and made a part of the system of drainage of appellants, but of which appellants, because of a shortage of funds, had only constructed the lower portion although the funds for constructing said system were raised from all the lands in said district, and that the landowners in the upper part of the district had formed a subdistrict and completed the ditch in appellants' system in place of by mandamus appellants to complete their original system.

A rejoinder to the replications was filed setting up that a subdistrict known as Drainage District No. 4 had been organized and had cleaned out the part of

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the Gilkey ditch constructed by appellants and had finished the construction of the ditch known as "The Gilkey Branch" above that part of the ditch dug by appellants and that said Drainage District No. 4 was organized for the purpose of completing the system of appellants. The pleading was continued through sur-rejoinders and rebutters averring the dissolution of said Subdistrict No. 4, and the organization of District No. 4, and other facts until issue was joined.

Appellants also, after the case was remanded, filed a special plea averring that the appellants, after determining upon the cleaning out of said ditch, gave notice of the time and place of the letting and the kind and amount of work to be done in the manner provided by statute, and in accordance with said notice met and opened bids and rejected all bids, and without re-advertising for bids let the contract to appellee. To this plea a replication was filed denying the rejection of all the bids and averring that they, at the time the bids were opened, negotiated with the lowest bidder and offered the work at a price lower than the lowest bid and that the contract was made with the lowest bidder at a price lower than the lowest bid, and on this issue was joined. The foregoing states the substance of the material averments upon which issues were joined.

The issues on the last trial were entirely different from those on the first appeal. This court on the former appeal only passed upon two questions, the ruling of the court in sustaining a demurrer to special pleas which was held to be erroneous and the right of a drainage district to contract for doing work which is no part of its system, but which is exclusively the work of another drainage system over which the original district has no jurisdiction. The case was tried the last time upon issues made in special pleas, that presented issues that were not involved on the first trial, for the reason that the court had by sus-

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taining a demurrer to the pleas held that they did not set up any defense, and a new plea was filed, setting up an issue that was not suggested in any way on the first appeal. On this trial the evidence showed that the work done was on the system of appellants and not that of another system. A drainage district organized within another drainage district or partly within and partly without another district for the purpose of local and more minute drainage is not authorized to clean out or improve ditches specified in the order embracing the plans of the main district. *People ex rel. Parmenter v. Wilder*, 257 Ill. 304; *Mason & T. Spec. Drain. Dist. Com'rs v. Griffin*, 134 Ill. 338.

The argument of appellants that the judgment on the first appeal is *res judicata* on all questions of law or fact that either were tried, or might have been presented, if applicable as against appellee would also deprive appellants of the right to file pleas concerning the manner of letting the contract, since appellants by proper plea might have presented the question concerning the letting of the contract. Furthermore, if the matters in controversy were adjudicated and there was nothing further to try, the cause should not have been remanded, as under the contention of appellants all that the trial court could do was render a judgment in favor of appellants, and permit the parties to incur needless costs. The former judgment of the Appellate Court was a general reversal and was neither final nor conclusive between the parties. It is only binding on the present appeal as to questions of law passed upon. *Henning v. Eldridge*, 146 Ill. 305; *Friedman v. Leshner*, 198 Ill. 21; *Illinois State Trust Co. v. St. Louis, I. M. & S. Ry. Co.*, 217 Ill. 504; *Hovland v. McNeill & Higgins Co.*, 104 Ill. App. 149. The judgment of the Appellate Court in the former opinion is not an adjudication of the matters involved.

The merits of the case are with the appellee. The evidence shows that the work was done under a con-

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tract between the parties strictly according to the contract and to the satisfaction of all parties concerned. The evidence sustains the finding of facts and the judgment of the trial court. The defenses urged are of a technical character, and while, if the legal question was properly raised, we do not wish to be understood as approving of the letting of contracts by municipal corporations in the manner the evidence tends to show this was let, or of holding to be legal the letting of municipal contracts that are let in any other manner than strictly as provided by the statute, yet since there were no propositions of law submitted to the court before the announcement by the court of its decision, there is no question of law saved for review. *Mutual Protective League v. McKee*, 223 Ill. 364; *La Salle County v. Milligan*, 143 Ill. 321; *Cramer v. Burkhalter*, 207 Ill. 34; *Keating v. Springer*, 146 Ill. 481; *Wight v. City of Chicago*, 234 Ill. 83; *City of Alton v. Foster*, 207 Ill. 150; *Chicago, B. & Q. R. Co. v. City of Ottawa*, 165 Ill. 207; *Burgener v. Lippold*, 128 Ill. App. 590. The judgment of the trial court is therefore affirmed.

Affirmed.

**The People of the State of Illinois ex rel. I. N. Cooley,
Appellant, v. Commissioners of Highways of the
Town of Embarrass, Appellees.**

1. ROADS AND BRIDGES, § 125*—*when petition for mandamus to compel relocation of road properly dismissed.* A petition on the relation of a landowner for a writ of mandamus to compel the highway commissioners to relocate a road, *held* properly dismissed where there was no proof that the road asked to be relocated was ever opened or used and it appeared that the present road had been used for forty-nine years.

2. ROADS AND BRIDGES, § 151*—*when old highway will be regarded abandoned by location of new road.* Where a highway has ceased

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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to be used and another is acquired with the consent of the public authorities, and the use of the original highway has ceased for a sufficient length of time to clearly indicate an acceptance by the public of the new highway, the old highway will be regarded as abandoned.

3. **ESTOPPEL**, § 93*—*applicability to public*. While the statute of limitations does not run against the public, the doctrine of estoppel may apply.

4. **MANDAMUS**, § 129*—*sufficiency of petition*. A petition for a writ of mandamus must show a clear right to the relief sought to be obtained.

5. **APPEAL AND ERROR**, § 528*—*when legal questions not saved for review*. When no propositions of law were presented to court trying the case without a jury and no question is raised concerning the introduction of evidence, no legal question is saved for review.

SCHOLFIELD, J., took no part in the decision of this case.

Appeal from the Circuit Court of Edgar county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914.

W. H. HICKMAN, for appellant; F. T. O'HAIR and F. C. VAN SELLAR, of counsel.

SHEPHERD & TROGDON and JAMES W. & EDWARD C. CRAIG, for appellees.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

The People of the State of Illinois, on the relation of I. N. Cooley, filed a petition in the Circuit Court of Edgar county alleging that in March, 1864, the Commissioners of Highways of the Town of Embarrass laid out and declared open a road described in the petition for it as "commencing at the Northeast corner of Section 36 of Piersol Brown, and at a road running west to the line of Douglas County, and running one mile east on the section line of 30 and 31, in town 15 N. of R. 13 W. to intersect a road running as far west and to the corner of Sections 30 and 31," thence north, etc. The survey and order opening the road

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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describes it as commencing at a rock at the southwest corner of section 30. The petition further alleges that when said road was staked out by the Commissioners, through an error as to the exact location of the south line of section 30, the road as staked out deviated from said line, and has since been used over the same route at the west end, the north line of said road as used being fifty-nine feet south of the true south line of said road as laid out, and running thence diagonally northeast for a distance of thirty rods before the road as used by the public joins the line of the true road; that the fence on the north side of said road as used for its entire length was within the boundaries of said road as laid out; that a petition to build a hard road between sections 30 and 31 has been acted on and a vote taken to levy a tax to build said road but said hard road cannot be built on said road as it now exists, and that it is the duty of the Commissioners to keep said road open as originally laid out and to cause all obstructions to be removed, and prays a writ of mandamus, etc. The Commissioners answered the petition denying all its allegations and stating that a public road is now and has been in exactly the same location as it was when originally laid out; that it has been taken care of by the Commissioners during all the time since it was opened; that the fences and buildings along it have been located in conformity therewith; that the relator and the Commissioners are estopped from insisting that the road is not in its proper location and that the road described in the petition, if ever laid out, has been abandoned by the public and the route used has been acquired by the public and that the relator has not the clear legal right to have the road opened as prayed. Upon a hearing before the court the writ was denied and the petition dismissed. The relator prosecutes this appeal.

There is practically no controversy over the facts. One Hiram Sandford owned the land on both sides

of the road when it was opened, but the relator now and for nearly ten years has owned the northwest quarter of section 31. C. P. Lycan, a surveyor and city engineer of the city of Paris, testified that he found the rock at the northeast corner of section 36 in the center of the road, as it now exists, and that he found the rock at the southwest corner of section 30, sixty feet north of the north line of the highway. From this evidence it appears that there is a jog of nearly seven rods between the ends of the east and west section lines in these adjoining townships. The petition for the road described the road as beginning at the northeast corner of section 36 at a road running west to the line of Douglas county, and the new road was to run thence "one mile east on the Section line of 30 & 31." The order of the Commissioners made in 1864 shows that they had caused a survey to be made and that the road was ordered laid out commencing at a rock at the southwest corner of section 30 and the road runs thence east. The evidence shows that after the road was staked out, a fence was built on the north side of it in 1866 as it was staked out and that fence has remained in the same location to the present time, and there is a hedge on the south line of the highway as it now exists that has been there for over twenty years. It is clear that the highway as it now exists has been in the same location for forty-nine years.

While the statute of limitations does not run against the public yet the doctrine of estoppel may apply. The land on both sides of the road has been transferred and the present owners became possessed of it with a road kept up by the Commissioners in its present location, which is where it was originally staked out. The location is not sought to be changed by the Commissioners but by a landowner who desires the road relocated, and there is no proof that the highway was ever opened or used where the relator now desires to have it located.

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Where a highway has ceased to be used and another is acquired with the consent of the public authorities, and the use of the original highway has ceased for a sufficient length of time to clearly indicate an acceptance by the public of the new highway, the old highway will be regarded as abandoned. *City of Peoria v. Johnston*, 56 Ill. 45; *Highway Com'rs Town of Lanesville v. Kinahan*, 240 Ill. 593; *Galbraith v. Littiech*, 73 Ill. 209; *Town of Lewiston v. Proctor*, 27 Ill. 414; *Champlin v. Morgan*, 20 Ill. 181; *People v. Davis*, 39 Ill. App. 162. The reasons for the estoppel of the appellant are much more forceful than in any of the cases cited because a highway never was opened or used where the relator now seeks to have it located, and the road as now located has been used for forty-nine years and has no jog in it.

A petition for a writ of mandamus must show a clear right to the relief sought to be obtained (*Parish v. People*, 203 Ill. 374), and that clear right does not appear here.

No propositions of law were presented and no question is raised concerning the introduction of evidence, hence no legal question is saved for review.

The trial court properly refused the prayer of the petition and dismissed the writ. The judgment is affirmed.

Affirmed.

MR. JUSTICE SCHOLFIELD took no part in the decision of this case.

Frank Whisman, Administrator, Appellee, v. G. H. Small, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 5, 1914.

Statement of the Case.

Action by Frank Whisman, administrator of the estate of Laura B. Whisman, deceased, against G. H. Small to recover damages for the death of Laura B. Whisman, the wife of Frank Whisman, alleged to have been caused by malpractice of defendant. The first count of the declaration averred that the defendant, a physician, was called to attend the deceased in her confinement and that he negligently infected the deceased at the time of the delivery of a child with erysipelas and thereby caused her death. The second count averred that the defendant did not exercise the degree of care commensurate with the standard of medical skill in the vicinity of Leroy, the residence of the deceased, and did not make as many professional visits as the seriousness of the case required, and that he wilfully abandoned the case and refused to give further treatment. A trial resulted in a verdict and judgment for plaintiff for two thousand five hundred dollars. To reverse the judgment, defendant appeals.

WELTY, STERLING & WHITMORE, for appellant.

STONE, OGLEVEE & FRANKLIN and LESLIE J. OWEN, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Bell v. Bennett, 188 Ill. App. 62.

Abstract of the Decision.

1. WITNESSES, § 131*—*when defendant incompetent to testify to conversations in suit brought by administrator.* In an action against a physician to recover for the death of plaintiff's intestate alleged to have resulted from malpractice, refusal to permit the defendant to testify to a conversation held between himself and a nurse in an adjoining room to that occupied by the patient and which could have been heard by the patient, and to a conversation between himself and the patient in which the nurse took part and concerning which the nurse had testified, *held* not error.

2. WITNESSES, § 93*—*exceptions to section 2 of Evidence Act construed.* Neither the second nor the fourth exception to section 2 of the Evidence Act, J. & A., ¶ 5519, permits a party in interest to testify to a conversation he may have had with the deceased, whether it was testified to by an agent of the deceased or by a disinterested witness, nor do they permit an adverse party to testify to a conversation of such adverse party that occurred before the death in the presence of the deceased and which is testified to by a disinterested witness not an agent of the deceased.

3. WITNESSES, § 48*—*burden of proving grounds of incompetency.* The presumption is that one offered as a witness is competent to testify, and the burden is upon the party objecting to state and prove the grounds of his objections.

4. WITNESSES, § 43*—*competency to testify to conversations with defendant's wife.* In a suit against a physician to recover for the death of plaintiff's intestate alleged to have resulted from malpractice, where the facts showed that a nurse attending the patient called up the doctor's office and was answered by the doctor's wife, *held* that under section 5 of the Evidence Act, J. & A., ¶ 5522, neither the nurse nor the doctor's wife were competent to testify to the telephone conversation for the reason that there was no evidence to show that the doctor's wife was acting as agent for her husband.

David E. Bell, Appellee, v. Joseph E. Bennett, Executor, Appellant.

1. EXECUTORS AND ADMINISTRATORS, § 262*—*right of heir to contest claims.* Heirs have the right to object to the allowance of a claim presented against an estate.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Bell v. Bennett, 188 Ill. App. 62.

2. **BILLS AND NOTES, § 408***—*burden of proving execution.* An affidavit denying the execution of a note sued on places the burden of proving its execution by the alleged maker on the plaintiff.

3. **BILLS AND NOTES, § 462***—*when instruction as to burden of proof of execution erroneous.* In an action to have a note allowed against the estate of the alleged maker where one of the heirs filed an affidavit denying its execution, *held* that an instruction given for plaintiff which placed on the estate the burden of proving that the signature to the note was not the signature of the deceased, was erroneous.

4. **BILLS AND NOTES, § 406***—*burden of proof.* In an action to have a note allowed as a claim against the estate of the deceased maker, the burden is upon the estate to prove that there was no consideration for the note and that it had been wholly or in part paid.

5. **INSTRUCTIONS, § 81***—*when improper as giving special prominence to part of the evidence.* An instruction directing the attention of the jury to particular entries made in books of account which were admitted in evidence, *held* improper as giving special prominence to a particular part of the evidence.

Appeal from the Circuit Court of DeWitt county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 5, 1914.

STONE & GRAY, for appellant.

JOHN FULLER, HERRICK & HERRICK and INGHAM & INGHAM, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

David E. Bell filed a claim in the County Court of DeWitt county against the estate of his father, David E. Bell, deceased. An appeal was taken from the judgment of the County Court to the Circuit Court where on a trial before a jury a verdict was returned in favor of claimant for \$1,970.18, on which judgment was rendered. Joseph E. Bennett, the executor of the estate of the deceased, and who is also a son-in-law of claimant, and three of the heirs prosecute this appeal.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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The claim as sworn to by claimant is:

“To board, lodging, care and attention and special attention in sickness furnished and rendered to David Bell from the 27th day of April, 1909, to the 5th day of October, 1910, at \$20 per week.....\$2,580.00
To principal due on note..... 1,000.00
To interest on same at 5% from July 11, 1912 18.62”

In the Circuit Court an affidavit made by J. W. Bell was filed, which states that affiant “is the son of David Bell deceased and one of the heirs at law of said David Bell deceased; that he has examined the note which is a portion of the claim sued on in this case; that he is acquainted with the handwriting of David Bell, deceased, and that he believes that the signature of the note for one thousand dollars on which a portion of this suit is based is not the genuine signature of David Bell deceased.” Heirs have the right to object to the allowance of a claim presented against an estate. Section 60, Administration Act (J. & A. ¶ 109); *Schlink v. Maxton*, 153 Ill. 447; *Mason v. Bair*, 33 Ill. 194.

The affidavit denying the execution of the note placed the burden of proving its execution by the alleged maker on the appellee. Section 52, Practice Act (J. & A. ¶ 8589). The evidence is conflicting as to whether the signature to the note is the signature of the deceased. In that condition of the evidence it was necessary that the instructions on that issue should be accurate. The twelfth instruction given for appellee is: “The court instructs the jury that the note in evidence, if executed by the deceased, David Bell, is prima facie evidence that at the time of its execution, David Bell was indebted to the plaintiff, David E. Bell, for the full amount specified in the note; and, before the defendant can defeat that claim, he must prove by a preponderance of the evidence that there was no consideration for the giving of the note, or that it has been paid, or that it has not the genuine signature of David Bell attached thereto.”

The latter part of this instruction places on the estate the burden of proving that the signature to the note is not the signature of the deceased, while the law is that the burden of proving the signature is on the appellee, when the execution of the instrument had been denied by an affidavit made by one of the heirs to the estate.

It is also contended on behalf of appellant that there was no consideration for the note and that it was a gift from the deceased to the appellee, and if the note was executed by the deceased that it had been wholly or in part paid. Upon these questions the burden of proof was upon appellant. If the appellee proved the execution of the note by the deceased by a preponderance of the evidence, then appellee would be entitled to recover for the full amount of the note, unless the appellant sustained by a preponderance of the evidence some one of the other defenses claimed.

A book kept by the deceased containing several pages of accounts was offered and admitted in evidence. The fourth instruction given at the request of appellee directed the attention of the jury particularly to the entries on "page 91 thereof." Instructions should not direct the jury's attention to particular portions of the evidence and thereby give such evidence special prominence.

Since the case must be reversed for the errors pointed out we refrain from expressing any opinion on its merits. The judgment is reversed and the cause remanded.

Reversed and remanded.

Gullett v. Leaverton et al., 188 Ill. App. 66.

**James W. Gullett, Appellant, v. George W. Leaverton
and Grace Leaverton, Appellees.**

1. FRAUD, § 72*—*when declaration in action for fraud and deceit sufficient.* A declaration in an action on the case for false representations and deceit on the part of defendants to induce plaintiff to purchase real estate, *held* not demurrable because it did not allege the contract was in writing.

2. FRAUD, § 72*—*sufficiency of declaration in action for fraud and deceit.* In an action on the case for false representations and deceit alleged to have induced plaintiff to purchase real estate, the contract of sale need not be pleaded as if the action were based on the contract, but so much of it should be set forth as will describe the wrong sought to be redressed.

3. FRAUD, § 58*—*averments and proofs to sustain action for fraud and deceit.* To recover for fraud and deceit all that is necessary to aver and prove is that the representations made were untrue, that the party making them knew them to be false, that the representations made were material to the transaction and were made with intent to deceive, that the party to whom the representations were made relied upon them as true, and was induced to act by reason of such representations and was misled and damaged thereby.

4. VENDOR AND PURCHASER, § 39*—*when false representation of vendor material.* Representation made by a vendor to a proposed purchaser of a city lot that the main pipes of the city heating plant were in the street in front of the lot so that a building desired to be erected on the lot by the purchaser could be connected with the plant, *held* not to be a statement puffing the value of the lot but a statement of a material fact.

5. VENDOR AND PURCHASER, § 42*—*when purchaser need not investigate vendor's representation.* Where a vendor makes a representation that a city lot was situated on a street in which the mains of the city heating plant were laid, the purchaser may rely on its truth without investigating the representation.

6. FRAUD, § 72*—*when counts in declaration demurrable as indefinite.* Counts in a declaration for fraud and deceit in inducing plaintiff to purchase city lots, which averred that defendants knowingly and falsely represented that the mains of the city heating plant were accessible to it, *held* demurrable as indefinite in so far as they state the mains were accessible.

Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gullett v. Leaverton et al., 188 Ill. App. 66.

October term, 1913. Reversed and remanded with directions. Opinion filed May 5, 1914.

NOAH GULLETT, G. B. GILLESPIE and A. M. FITZGERALD, for appellant.

SMITH & FRIEDMEYER, for appellees.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

James W. Gullett begun this action in case against Grace Leaverton and George W. Leaverton for fraud and deceit averred to have been used by defendants in making the sale of a city lot to plaintiff. A demurrer was sustained to the declaration and judgment entered in favor of the defendants. The plaintiff appeals.

The declaration contains four counts. The material averments of the first count are: That appellant purchased from appellees certain real estate in the city of Springfield; that the inducement which caused appellant to purchase this property was the false representations of appellees that "City Hot Water Heat" was accessible to the said premises and that the main pipes of the "City Hot Water Heating Plant" were laid in the street in front of them so that the owner thereof could attach and connect heating pipes thereto from the said premises and heat buildings thereon; that such representations were false and fraudulent; that appellees well knew that these representations were false and fraudulent, and made them for the purpose of deceiving appellant; that appellant did not know that they were false; that because of these representations appellant, relying upon them, was induced to and did purchase the premises in question, and that because of such false and fraudulent representations appellant has suffered damage of one thousand dollars.

The second count contains the further averment that appellees knew appellant desired to purchase a lot on which to erect a flat building.

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The third and fourth counts omit the averment that the pipes of the heating plant were laid in the street in front of the lot but aver that appellees knowingly and falsely represented that they were accessible to the said premises.

The demurrer states as a special cause that the declaration is insufficient because each count is based on a supposed contract for the sale of real estate, and it is not alleged that said contract is in writing. The contract not being the foundation of an action on the case for false representations and deceit, need not be pleaded as if the action were based on the contract, but so much should be set forth as will describe the wrong sought to be redressed. 8 Encyc. of Pl. & Pr. 909.

To recover for fraud and deceit all that is necessary to aver and prove is that the representations made were untrue, that the party making them knew them to be false, that the representations made were material to a transaction and were made with intent to deceive, that the party to whom the representations were made relied upon them as true, and was induced to act by reason of such representations and was misled and damaged thereby. *Merwin v. Arbuckle*, 81 Ill. 501; *Crocker v. Manley*, 164 Ill. 282.

The appellees insist that the representations averred in the declaration were only puffing or exploiting the value of the lot. The averment of the declaration is that appellant desired to purchase a lot for the purpose of erecting thereon a "flat building," so situated that it could be connected with the mains of the city heating plant and heated therefrom; that appellees knew the wishes of appellant and falsely and fraudulently represented that the lot they sold appellant was so situated. The representations made were representations of fact which it is averred were untrue. The statement that the main pipes of the heating plant were in the street in front of the lot was neither puffing the value nor a statement concerning the value but was a state-

Moratz v. McCarthy, 188 Ill. App. 69.

ment of a material fact. Heating mains are not obvious to the inspection of people, and there was no reason or cause for appellant to suspect the statement was false. It was not necessary for him to investigate the representation; he had the right to rely upon its truth. *Endsley v. Johns*, 120 Ill. 469; *Antle v. Sexton*, 137 Ill. 410; *Linington v. Strong*, 107 Ill. 295; *Van Velsor v. Seeberger*, 59 Ill. App. 322.

The counts that state the mains were accessible are indefinite and as to those two counts the demurrer was properly sustained, but the first and second counts state a good cause of action and the demurrer should have been overruled as to them. The judgment is reversed and the cause remanded with directions to overrule the demurrer to the first and second counts.

Reversed and remanded with directions.

**Paul O. Moratz, Appellee, v. Maurice C. McCarthy,
Appellant.**

(Not to be reported in full.)

Appeal from the County Court of McLean county; the Hon. HOMER W. HALL, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914.

Statement of the Case.

Action by Paul O. Moratz against Maurice C. McCarthy to recover an amount due on an order for \$77.67 given to plaintiff by defendant on a settlement of a building account. The suit was begun before a justice of the peace and an appeal was taken to the County Court. The court on the day the case was set for trial denied defendant's motion for a continuance, but postponed the trial until the next day. Defendant failing to appear on the following day, plaintiff re-

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covered a verdict and judgment for \$82.50. To reverse the judgment, defendant appeals.

Counsel for appellant made a statement of the case but filed no brief or argument.

DEMANGE, GILLESPIE & DEMANGE, for appellant.

LIVINGSTON & BACH, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

CONTINUANCE, § 51*—*when denial of motion not error.* A denial of defendant's motion for a continuance made on the day the case was set for trial on the ground that defendant and his attorney had no notice of the setting of the case for trial and that defendant could not be ready on that day because he did not know the whereabouts of two of his witnesses, who were in the city of Bloomington, and because another witness was in Taylorville, *held* not error where it appeared the court offered to postpone the trial until 1:30 P. M. the next day and counsel stated he could not be ready by that time, but the court did postpone the trial to the following day and no reason appeared showing why defendant could not have been ready the day the case was tried if he had used any diligence to procure his witnesses after the hearing was postponed.

Edward F. Trego, Trustee for use of William Moore and Alfred H. Trego, Appellant, v. The Estate of James A. Cunningham, Deceased, Appellee.

1. PRINCIPAL AND SURETY, § 96*—*insolvency of cosureties as affecting right to contribution in law and equity.* In a suit at law against a cosurety for contribution, the surety can only recover a cosurety's aliquot part calculated on the whole number of sureties without reference to the insolvency of the cosureties, while in equity, if one or more are insolvent, the loss is apportioned among the solvent ones.

2. CONTRIBUTION, § 2*—*jurisdiction of Probate Court to follow the*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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rule in equity. Where a trustee for the use of sureties on notes presented a claim against the estate of a deceased cosurety, *held* that the Probate Court could follow the rule of a court of equity as to the extent of recovery, by considering the number of insolvent cosureties and apportioning the loss on the solvent ones.

3. **BILLS AND NOTES, § 177***—*when indorsers liable as guarantors and cosureties as to each other.* The provisions of paragraphs 2 and 3 of sec. 64 of the Negotiable Instrument Act of 1907, J. & A. ¶ 7703, make indorsers, before delivery of a note payable to the order of the maker, guarantors and cosureties as regards each other.

4. **BILLS AND NOTES, § 183***—*liability of indorsers as to each other.* In determining the liability of indorsers to each other, section 68 of the Negotiable Instrument Act of 1907, J. & A. ¶ 7707, should be read in connection with the provisions of section 64 of such Act, J. & A. ¶ 7703.

5. **COURTS, § 105***—*equitable jurisdiction of Probate Courts.* Although Probate Courts have no general chancery jurisdiction, yet in probate matters they have jurisdiction of an equitable character, may adopt the forms of equitable proceedings and grant relief of an equitable nature where justice and equity require such relief.

Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914, Rehearing denied June 25, 1914. *Certiorari* allowed by Supreme Court.

H. M. STEELY, H. M. STEELY, JR., and J. B. MANN,
for appellant.

DYER & DYER, REARICK & MEEKS and FRANK LINDLEY,
for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Edward F. Trego, trustee for the use of William Moore and Alfred H. Trego, presented to the Probate Court of Vermilion county two claims against the estate of James A. Cunningham, deceased. The claims are for contribution to the amounts alleged to have been paid by the trustee on behalf of the beneficiaries on notes made by the Hoopeston Horse Nail Company, pay-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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able to itself and which, before delivery, were indorsed by the company and James A. Cunningham, William Moore, Alfred H. Trego, John L. Hamilton, C. S. Crary and W. W. Todd.

One of the claims is for \$110,601.58 being one-third of the sum of \$331,804.76 that claimant insists he paid for the beneficiaries in satisfaction of seventy-six of said notes. The other claim is for \$2,017.61, one-third of the sum of \$6,052.84 which claimant insists was paid by him for the beneficiaries in satisfaction of four other notes. From the judgments rendered in the Probate Court appeals were taken to the Circuit Court, where by agreement of the parties they were consolidated and tried by the court without a jury. A judgment was rendered in the consolidated case allowing the claim to the amount of \$47,626.46 as of the seventh class, to be paid in due course of administration. An appeal was prayed by both parties and the claimant has perfected his appeal.

The appellant assigns as error that the court should have entered judgment in his favor for \$95,252.92, and that the evidence showing that Todd, Crary and Hamilton were insolvent; the court should have held the estate liable for one-third of the amount paid by the trustee in satisfaction of the notes of the company, while it only held the estate liable for one-sixth of the sum paid by the trustee.

The appellee has assigned cross-errors and contends (1) that the five surviving indorsers of the notes loaned their credit to the company after the death of Cunningham and that the principal debtor paid the notes; (2) that Moore's and Trego's names were indorsed above Cunningham's name on the notes and that therefore they cannot have contribution without proof of a contract that all indorsers should be equally liable; (3) that a large part of the notes and interest was paid with the assets of the company; (4) in hold-

ing the propositions of law submitted by appellant; and (5) that the judgment is excessive. Other errors are assigned but are not argued.

Counsel for appellant state in their argument that the court only rendered judgment for one-sixth of the amount that it found had been paid by the beneficiaries of appellant as coindorsers of the notes of the company, and counsel for appellee in their statement and argument admit that the court only rendered judgment for one-sixth of the amount so paid. There is nothing in the record that justifies such statement of appellant and the admission of appellee. The ruling of the court on the propositions of law and fact presented by appellant shows that the court held that appellant was entitled to recover one-third of the amount paid by the beneficiaries as such indorsers, and this court must review the case as it appears in the record.

The record is voluminous, yet there is little controversy over the facts. Cunningham died January 11, 1910. The Hoopeston Horse Nail Company was a corporation engaged in the manufacture of horseshoe nails and the sale of collar pads. James A. Cunningham, William Moore, Alfred H. Trego, John L. Hamilton, C. S. Crary and W. W. Todd, held all the stock of the company and were directors. The Horse Nail Company, Hamilton, Crary and Todd were insolvent. At the date of Cunningham's death his name appeared as indorser with the other five stockholders on \$318,318.23 of the company's paper. These notes were about eighty in number and were in the following form:

“\$5,000.00 Hoopeston, Ill., July 16, 1909 No.———.

Six months after date, we, or either of us, promise to pay to the order of ourselves Five Thousand and no/100 dollars, value received, with interest at 7 per cent per annum from maturity payable annually at Hoopeston National Bank, Hoopeston, Illinois.

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HOOPESTON HORSE NAIL COMPANY, (SEAL.)
By A. H. TREGO, Pres. (SEAL.)

indorsed as follows:

HOOPESTON HORSE NAIL COMPANY,
By A. H. TREGO, Pres.

C. S. Crary, William Moore, A. H. Trego, John L. Hamilton, J. A. Cunningham, W. W. Todd."

except that they differed as to the amounts and dates, and five of them bore interest at a less rate and the order of the indorsers varied, in that while all six directors indorsed the notes, with the exception of one \$10,000 note held by the Hoopeston National Bank, on which Cunningham's name did not appear for the reason he was an officer of the bank, and that sometimes Cunningham's name was indorsed above the names of either Moore or Trego and sometimes after their names. These notes were held by banks scattered over the States of Illinois and Indiana wherever a bank would discount the paper.

After the death of Cunningham the remaining directors undertook to negotiate with the representatives of his estate to arrive at some agreement whereby the estate would remain liable for its share of the liability on the company's notes and on new notes that should be issued to pay notes as they matured, but they did not succeed in making any agreement.

At the date of Cunningham's death the assets of the company consisted of \$23,124.33 in the hands of the treasurer, of which \$10,000 was derived from the discount of the \$10,000 note at the Hoopeston National Bank, about \$75,000 worth of merchandise bills and accounts receivable and real estate of the value of \$15,000, in all about \$113,000.

Immediately after Cunningham's death a circular letter was sent out by the company to all the holders of its paper advising them of his death, and stating that the paper of the company would be issued as before and indorsed by the five surviving indorsers who were represented to be worth \$1,500,000.

The company succeeded in discounting eight notes, amounting to \$42,500 made by it and indorsed by the five directors, and with part of the proceeds of these notes it paid six of the notes, amounting to \$27,500, included in the itemized claim of appellant. The remaining proceeds of the eight notes, with \$56,161.51 received from the sale of nails and pads, was used to retire \$40,500 of the notes listed in appellant's claim and a \$2,500 note on which Cunningham's name was indorsed, but which was probably not negotiated until after his death, it being in the mail at that time, and in paying the expenses of running the business of the company for several months after Cunningham's death. The remaining notes of the company outstanding at the death of Cunningham with interest at five per cent. from the date of payment, amounting in all to \$285,958.76 were taken up with the proceeds of notes executed by the five surviving directors, and on which the name of the company did not appear. Notes executed by these five directors are hereinafter called joint notes.

After the attempt to make an arrangement with the Cunningham estate under which it would remain liable for the indebtedness of the company had failed, the five remaining directors signed a large number of notes in blank, and left them in the custody of Todd, the manager of the company. After February 1, 1910, if the holder of one of the notes on which Cunningham's name appeared as an indorser with the other directors, wanted payment of his note, he was given a joint note, if he would accept it; if he would not accept such a note, the Horse Nail Company borrowed the money elsewhere on one of the joint notes. The proceeds of the joint notes were deposited in the bank to the credit of the company until May 10, 1910, and were paid out by the check of the company in the payment of current expenses of the company, and in taking up notes as they matured the company appears to have used the pro-

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ceeds as it pleased. A stipulation shows that forty-three notes included in appellant's claim and including the \$40,500 of notes paid with money from other sources than the proceeds of joint notes on which Cunningham's name appears, the principal of which amounts to \$150,718.23, were paid off by the checks of the Horse Nail Company without issuing joint notes to the holders.

After May 10, 1910, when a joint note was negotiated the proceeds were placed to the credit of the Horse Nail Company, and when a note came due the company issued its check to Trego, trustee, and the trustee issued his check to the creditor. After November 15, 1910, Trego and Moore furnished cash to pay some notes, and when they furnished cash they took notes executed by the other directors either to themselves or by themselves and the other directors to third parties for their own use.

The appellee insists that because of the method adopted in the payment of the notes of the Horse Nail Company and the method by which the money was procured that was used to pay the notes, that the payment was not made by the beneficiaries of appellant but by the original debtor, the Horse Nail Company. The evidence tends to show that a stock of these joint notes, signed in blank, was kept on hand in the possession of Todd, the manager of the company as the agent of Moore and Trego, and when it was necessary to use one, it was filled in with the date and amount and put in circulation. The Horse Nail Company was insolvent and unable to pay its notes or continue in business without financial assistance. The makers of the joint notes in lending the company their credit and executing their notes to it, which it sold without its indorsement, secured to the company the means with which it paid its notes and for a time continued its business. The transactions up to May 10, 1910, have the appearance of a loan of the credit of the makers

of the joint notes rather than the payment of a security debt. After that time the notes were paid by the trustee or the beneficiaries until all the company's notes were paid. It also appears that Moore and Trego were only making these joint notes for the purpose of paying off the company's notes that the assets of the company, when reduced to cash, were insufficient to pay, and of which they were the only solvent guarantors.

The appellant offered and the court held the following propositions of law:

"It being shown that six parties endorsed the notes on which the claims in this case are founded, on the back thereof, to-wit: C. S. Crary, A. H. Trego, William Moore, W. W. Todd, J. A. Cunningham, and John L. Hamilton, and it being shown that C. S. Crary, W. W. Todd and John L. Hamilton are each insolvent, the Court holds it to be the law that the loss should be apportioned equally between William Moore, A. H. Trego, and the estate of J. A. Cunningham, deceased, to-wit, each one bearing the one-third part thereof, with interest.

"2. The Court holds it to be the law that where several parties are liable as makers, or as sureties, or as endorsers, or as guarantors, and one or more of them pay the debt or demand, they are entitled to contribution from the other solvent makers, sureties, endorsers or guarantors, and that the loss must be apportioned among the solvent parties, equally.

"3. The Court holds it to be the law that in the allowance of claims, on appeal from the Probate Court, the jurisdiction of the Court extends to claims of both a legal and an equitable character, and that the Court acts as a court of equity in the allowance of claims and is governed by the same equitable rules and principles that govern in a proceeding in equity."

The appellant also asked the court to hold, as a question of law, that Crary, Todd and Hamilton under the evidence were at the time of the death of Cunningham and now are insolvent; this the court marked "Held as a question of fact, only." The court having

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held on every proposition of law and fact as requested by appellant, he has no reason to complain concerning the holdings of the court.

Appellee however contends that the court erred in its holding on the propositions of law. The contention of appellee regarding the first proposition of law is that the six indorsers of the notes of the company outstanding at the time of Cunningham's death were ordinary indorsers, under the provisions of the statute (section 68, Neg. Inst. Act of 1907, Hurd's R. S., ch. 98, § 86, J. & A. ¶ 7707) which provides: "As respects one another indorsers are prima facie liable in the order in which they indorse but evidence is admissible to show that as between or among themselves they have agreed otherwise." It is argued that there is no evidence of any agreement among the indorsers and that in every note Cunningham's name appears below that of one of the beneficiaries.

The provisions of paragraphs 2 and 3 of section 64 of the Negotiable Instrument Act of 1907 (Hurd's R. S., ch. 98, § 82, J. & A. ¶ 7703) are an answer to appellee's contention and have been overlooked. This section of the statute concerns the liability of indorsers in blank before delivery. These provisions are: "2. If the instrument is a note or unaccepted bill payable to the order of the maker or drawer or is payable to bearer he is liable to all parties subsequent to the maker or drawer. 3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee." These provisions clearly make indorsers, before delivery of a note payable to the order of the maker, guarantors and cosureties as regarding each other. The provisions of the statute relied upon by appellee must be read in connection with the provisions of section 64, and the case of *Tinker v. Catlin*, 205 Ill. 108, was decided before the Act of 1907 was passed and does not control the statute.

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If this was a suit at law by a surety against a cosurety for contribution appellant could only recover a cosurety's aliquot part calculated on the whole number of sureties without reference to the insolvency of the cosureties, while in equity, if one or more are insolvent the loss is apportioned among the solvent ones. *Sloo v. Pool*, 15 Ill. 47; 9 Cyc. 801; *Byers v. Alcorn*, 6 Ill. App. 39. Appellant contends that in the allowance of claims a Probate Court is a court of equity. It was said by Justice Cartwright in *Thomson v. Black*, 200 Ill. 461: "The common law remedies against a party cease at his death, and the statutory remedies against his estate provided by the Administration act must then be pursued, so far as the probate court is concerned. * * * All demands of every nature are to be exhibited to the probate court for adjustment and to be classified and settled. * * * No regular pleadings are required. * * * Claims not due may be allowed, and the proceedings bear no analogy to proceedings conducted according to the course of the common law. It was not intended by the legislature that claims should only be presented in technical legal forms. * * * The proceeding in the presentation and allowance of claims is not according to the common law practice, and there is no mode of preserving the evidence or exceptions or making them a part of the record as in a suit at law. (*Blair v. Sennott*, 134 Ill. 78.) It is not governed by technical rules which apply to a formal suit at law. (*Scheel v. Eidman*, 68 Ill. 193.) In allowance of claims against estates the Probate Court disregards mere matters of form and looks to the substance. (*Wolf v. Beaird*, 123 Ill. 585.) In a matter where equitable relief is required the court will adopt forms of equitable procedure, and in other cases will secure to parties the rights allowed them by law, for the purpose of arriving at an adjustment of the claim." The same principles are announced in *Dixon v. Buell*, 21 Ill. 203; *Chicago Title & Trust Co. v. McGlew*, 193 Ill. 457; *Bliss v. Seaman*, 165 Ill. 422; *Carter*

Trego et al. v. Cunningham, 188 Ill. App. 70.

v. Pierce, 114 Ill. App. 589. Although Probate Courts have not general chancery jurisdiction, yet, in probate matters, they have jurisdiction of an equitable character and may adopt the forms of equitable proceedings and grant relief of an equitable nature where justice and equity require such relief. There was no error in the holding of the court on the propositions of law submitted.

No findings of fact were requested by either party except the one as to the insolvency of the three directors, and appellee has not argued the holding of the court on that question. It is not pointed out by either party, wherein it is claimed the court erred in its finding of any facts, except that appellant states that the judgment rendered is for one-sixth of a sum that was paid by him or his beneficiaries on the company's notes. From the court's holding on the propositions of law, and the question of fact submitted, it would appear that it rendered judgment for a third of the amount it found had been paid by the guarantors or sureties on the company's notes. The court apparently held that the \$2,500 which was negotiated after Cunningham's death, the \$27,500 paid from company notes negotiated after Cunningham's death, and the forty-three notes included in the stipulation, the principal of which amounted to \$150,718.23, the total amounting to \$180,718.23, without interest, were not paid by the beneficiaries as guarantors or sureties, although a large part of these notes was paid from money procured on their credit, since the assets of the company at the date of Cunningham's death only amounted to \$113,500; this would leave notes of the company amounting to \$137,600, not including interest thereon, substantially all of which the court found were paid by the appellant or his beneficiaries, as indorsers, and for one-third of which with legal interest the court rendered judgment.

Neither party has pointed out any particular company's notes that they claim were erroneously included

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by the court as amongst those paid by the guarantors nor any which were improperly excluded therefrom. The arguments deal in generalities and classes of notes and are devoted in the main to the principles of law involved in the case, and the court properly held on every proposition as requested by appellant. We cannot say that the judgment is not sustained by or is against the manifest weight of the evidence, or that it is not for all that claimant is entitled to recover, and it is therefore affirmed.

Affirmed.

**In the Matter of the Estate of Camelo Purvechio,
Deceased.**

**H. Earnest Hutton, Administrator, Appellant, v.
Calogera Giordona Porrovecchio, Appellee.**

1. TRIAL, § 293*—*when submission of propositions of law improper.* Propositions of law cannot be submitted on the hearing of a petition to have an order granting second letters of administration on the same estate, since such propositions may be submitted only in a case where the right to a trial by jury exists and has been waived.

2. EXECUTORS AND ADMINISTRATORS, § 52*—*when admission of incompetent evidence harmless.* On the hearing of a petition by the widow of the intestate to have an order granting second letters of administration on the estate of her deceased husband vacated, the admission in evidence of pleas in a suit of the administrator and a power of attorney executed by the widow *held* improper, for the reason such evidence was incompetent for any purpose, but its admission *held* harmless error where it was admitted on the hearing that the names given to the decedent in the grant of letters stood for the same person.

3. EXECUTORS AND ADMINISTRATORS, § 45*—*effect of two separate grants of letters of administration.* Two separate and valid grants of letters of administration on the same estate cannot exist at the same time in the same court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. EXECUTORS AND ADMINISTRATORS, § 49*—*authority to revoke invalid grant of second letters.* The Probate Court has authority to revoke and set aside a void order granting second letters of administration on the same estate where the order was procured on a petition constructively fraudulent.

5. EXECUTORS AND ADMINISTRATORS, § 51*—*sufficiency of order revoking invalid grant of letters.* An order of the Probate Court revoking and setting aside an order granting second letters of administration need not make any order concerning the acts of the administrator done in pursuance of the appointment thereunder.

Appeal from the Circuit Court of Vermilion county; the Hon. MORTON W. THOMPSON, Judge presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914. Rehearing denied June 25, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement by the Court. On January 23, 1912, H. Earnest Hutton, public administrator, filed in the Probate Court of Vermilion county, a petition, sworn to by himself, stating that Peter Chermen died intestate in said county on January 22, 1912, leaving property of the value of three hundred dollars, and a widow and four children, whose names are unknown; that they are nonresidents of Illinois; that there is no person, a resident of Illinois, who is entitled to a distributive share of his estate, and asking that letters of administration upon said estate be granted to petitioner. An order was made appointing petitioner administrator of the estate of Peter Chermen, and letters were issued to him on February 10, 1912. On March 1, 1912, he, as such administrator, filed a verified petition in the Probate Court stating that the estate had little property, but had a cause of action against the Bunsen Coal Company for causing the death of Chermen and asking authority to employ an attorney to obtain a settlement or bring suit on a contingent fee, and an order was made granting the prayer of the petition. Thereafter the administrator employed S. M. Clark, an attorney, to begin a suit against the Brazil Block

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Coal Company to the May term of the Vermilion Circuit Court.

On March 23d, H. Earnest Hutton as public administrator filed a petition in the Probate Court of Vermilion county, sworn to by himself, stating that Camelo Purvechio died on January 22, 1912, leaving personal property of the value of \$900, and leaving surviving him Calogera Giordona Porrovecchio, his widow, and three minor children giving their names, all residents of Villarosa, Italy, his only heirs at law, and praying to be appointed administrator of the estate of said Purvechio. An order was made appointing him administrator of said estate on his giving bond, and on March 27th said letters were duly issued to him. On April 27, 1912, as administrator of the estate of Purvechio, he presented to the Probate Court a verified petition stating that the estate had a cause of action for the death of Purvechio against the Brazil Block Coal Company and asking authority to make a contract with J. Ed. Thomas, an attorney familiar with the facts, to procure a settlement or bring a suit on a contingent fee. The court on the day the petition was filed made an order granting the request of the petition. The same day the administrator filed another petition stating that Purvechio was killed on January 22, 1912, by a rock falling on him in room 58, in a certain entry of mine 3, of the Brazil Block Coal Company; that there was a danger mark on the rock that the deceased had been working under, and that there was a serious question whether there was any liability; that the coal company had offered nine hundred dollars, in settlement, and asking the court to authorize such a settlement. The court thereupon made an order authorizing the administrator to settle with the coal company and execute a release, and the administrator on said April 27th received the nine hundred dollars and executed a release to the coal company.

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On May 29, 1912, "Porrovecchio Giordona Calogera, surviving widow of Porrovecchio Carmelo, deceased," filed a petition in the estate of "Camelo Purvechio" sworn to by Salvatore Balsamello, who is the attorney in fact of the widow. This petition states that petitioner is the widow of "Porrovecchio Carmelo, deceased;" that there are three minor children of the deceased, and gives their names and ages: "that her said husband was known in Vermilion County, Illinois, as Peter Chermen, and received a certificate of competency as a coal miner issued by the Miners' Examining Board of Vermilion County * * * wherein he was known as Pete Chermen of Westville (Town), Vermilion (County), Illinois (State)." That he died January 22, 1912, of injuries received through the negligence of the Brazil Block Coal Company; that an inquest was held over the remains of said deceased and that the verdict described him as Pete Chermen. It then sets up the issuing of the two sets of letters of administration and asks that the letters granted on the petition of March 23d, be declared void, for the reason the court had no jurisdiction to issue such letters when letters had already been issued on the estate of the deceased.

The administrator answered the petition denying the statements therein except as to the issuing of letters to him and recites the settlement made in the name of the Purvechio estate.

On the hearing upon the petition of the widow, the court found that the two administrations were on the estate of the same person and set aside and revoked the letters upon the estate of Purvechio, but made no order as to the funds on hand received from the coal company. An appeal was taken to the Circuit Court where, on a hearing, an order was made finding the Probate Court had no authority to grant letters of administration to the public administrator upon the estate of Purvechio after having granted letters in the

same estate under the name of the estate of Peter Chermen, deceased. Hutton as administrator of Purvechio appeals.

H. M. STEELY, J. ED. THOMAS and H. M. STEELY, JR.,
for appellant.

CRUICE & LANGILLE, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

It is insisted the court erred in refusing to hold certain propositions of law presented by the appellant. This is not a case wherein the parties were entitled to a trial by jury. Propositions of law may be submitted only where the right to a trial by jury exists and has been waived. *People ex rel. James v. Chicago, B. & Q. R. Co.*, 231 Ill. 112; *Martin v. Martin*, 170 Ill. 18; *Schofield v. Thomas*, 236 Ill. 417. There was no error in refusing to hold the propositions presented.

It is further argued that the court admitted improper evidence. The only issue before the court was whether Chermen and Purvechio were one and the same party. The petition of the widow asserts that her husband, Purvechio, was known in Vermilion County as Peter Chermen, and that there are two grants of letters of administration in the same estate.

The administrator was a witness and he was asked the question: "When did you find out that the name of Peter Chermen and the name of Purvechio stood for one and the same party, deceased, in the same estate?" Ans. "As near as I can remember now, it must have been sometime in May of the same year." There was also other proof to the same effect that Chermen and Purvechio was the same person. The court over the objection of the administrator admitted in evidence the pleas in the suit of the administrator of the estate of Peter Chermen against the Brazil Block Coal

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Company and the power of attorney from the widow to Balsamello. These pleas and the power of attorney were all clearly incompetent for any purpose, but inasmuch as the administrator admitted that Chermen and Purvechio was one and the same person, the admission of the incompetent evidence was harmless error.

It is also insisted that the Probate Court had no authority to vacate the order appointing Hutton administrator of the estate of Purvechio. The contention of appellant is that the Probate Court can only revoke letters of administration for one of the reasons mentioned in sections 19, 26, 28, 29 or 30 of the Administration Act. (J. & A. §§ 67, 75, 77, 78, 79.) These sections provide for the revocation of original letters of administration, when they have been improperly granted to certain parties when other parties are by law entitled to administer, or when they are granted on some false pretense or for waste, etc., and with the exception of section 26 can have no application to the case under consideration.

Although Probate Courts have not general chancery jurisdiction, yet, in probate matters, they have jurisdiction of an equitable character and may adopt the forms of equitable proceedings and grant relief of an equitable nature, where justice and equity require such relief. *Dixon v. Buell*, 21 Ill. 203; *Chicago Title & Trust Co. v. McGlew*, 193 Ill. 457; *Bliss v. Seaman*, 165 Ill. 422; *Thomson v. Black*, 200 Ill. 465; *Carter v. Pierce*, 114 Ill. App. 589. It is not contended that when the Probate Court had lawfully granted letters on an estate that the same court could legally grant a second set of letters while the first were in full force. The rule appears to be that two separate and valid grants of letters of administration cannot exist at the same time in the same court. *Petigru v. Ferguson*, 6 Rich. Eq. (S. C.) 378; *Rambo v. Wyatt's Adm'r*, 32 Ala. 363; *Holmes v. Oregon & C. Ry. Co.*, 5 Fed. 523; *Bru-*

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baker's Appeal, 98 Pa. St. 21; *Razor v. Mehl*, 25 Ind. App. 645. There is an inherent power in the Probate Court to correct an error which it had been led into by a mistake of facts as to its jurisdiction. The legal title to the estate of the deceased vested in the administrator of the estate of Peter Chermen in trust for the parties entitled thereto. *Cross v. Carey*, 25 Ill. 562.

Until a valid revocation of letters of administration already granted on an estate is made, the County Court has no power or jurisdiction to appoint another as administrator *de bonis non* of the same estate, and an order for such appointment under such circumstances "was absolutely void." *Munroe v. People*, 102 Ill. 408. An order appointing a special administrator to collect without revoking the letters of a duly qualified and acting executor is void. *Day v. Bullen*, 226 Ill. 72. We are of the opinion that the Probate Court had full authority, in a direct proceeding for that purpose, to revoke and set aside a void order made by it on a petition constructively fraudulent.

It is also argued that the court should have consolidated the two administrations and made some order disposing of the nine hundred dollars paid by the coal company to Hutton as administrator of Purvechio. We fail to see any right of the court to consolidate a valid with an invalid grant of letters of administration or to make any order concerning the acts of the administrator done in pursuance of an invalid appointment. The order vacating the administration in the estate of Purvechio is affirmed.

Affirmed.

Meadors v. Illinois Central R. Co., 188 Ill. App. 88.

Thomas J. Meadors, Plaintiff in Error, v. Illinois Central Railroad Company, Defendant in Error.

1. MASTER AND SERVANT, § 485*—*when failure of conductor to observe rule of railroad company contributory negligence.* In an action against a railroad company for personal injuries received by a conductor in a collision with a northbound train while he was in charge of an extra southbound train, where it was alleged that defendant was negligent in failing to warn plaintiff of the approach of the northbound train, *held* that a direction of a verdict for defendant was not error, it appearing that there was a rule of the company giving the northbound train the right of way, and that the plaintiff violated another rule of the company requiring conductors on southbound trains to register at stations and seek information.

2. MASTER AND SERVANT, § 485*—*when failure of employee to observe rules constitutes contributory negligence.* Where a railroad employee has violated a rule of the railroad company designed for the protection of himself and the patrons of the company, which if he had observed he would not have been injured, such violation of itself is such contributory negligence as will preclude recovery.

PHILBRICK, J., took no part in the decision of this case.

Error to the Circuit Court of DeWitt county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914.

HERRICK & HERRICK, for plaintiff in error.

JOHN G. DRENNAN and LEMON & LEMON, for defendant in error.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an action brought by Thomas J. Meadors, the plaintiff in error, against the Illinois Central Railroad Company, defendant in error, to recover damages for personal injuries received by plaintiff, while an employee of defendant, in a railroad collision aver-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

red to have been occasioned by the negligence of the defendant. At the first trial in the Circuit Court a jury returned a verdict for the defendant, a motion for a new trial was allowed, and on the second trial, after the plaintiff had introduced his evidence, the defendant requested a peremptory instruction which was refused; at the close of the defendant's evidence it again requested a peremptory instruction which was given. The ruling of the court in thus withdrawing the case from the jury presents the ultimate question for determination.

The declaration contains five counts. The first count avers that the plaintiff at the time of the injury was in the employ of the defendant as a railroad conductor in charge of train "extra 913" running from Decatur to Centralia; that it was the duty of defendant to warn plaintiff of the approach of other trains running towards the train in charge of plaintiff, and that the defendant negligently failed to warn plaintiff of the approach of "extra 593" going north, so that the train of plaintiff would take a siding at Oconee and there permit said extra 593 to pass said extra 913 in safety, and that defendant negligently permitted extra 913 in charge of plaintiff to depart southward from Oconee, and by reason thereof said trains collided, etc.

The second and third counts aver negligence of the defendant in that the operator at Pana failed to deliver an order of the train dispatcher to hold extra 913 at Oconee. The fourth avers negligence in failing to signal extra 913 to stop at Pana, and the fifth avers that the defendant retained in its employ an incompetent switch tower operator at Pana and that by reason of his negligence the collision occurred. Each count avers that plaintiff was in the exercise of due care for his own safety.

The undisputed evidence is that the plaintiff was a conductor, who had been in the employment of de-

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fendant about fifteen years, running trains between Clinton and Centralia. On March 2, 1910, plaintiff's run ended at Decatur, where he stayed all night. The next morning he received an order to run extra 913, consisting of an engine and caboose, from Decatur to Ramsay, which is eighteen miles south of Pana.

Plaintiff testified that he was familiar with the rules and time tables of the Company. Rule B 2 is: "All northbound trains are superior to trains of the same class in the opposite direction." Rule B 5 is: "Train registers are kept at Clinton, Marva, Decatur and Pana. See rule 613. Rule 613 is: "At points where train registers are kept, conductor must enter in the register all information required by its form and before proceeding must know whether all the trains due, which are superior or of the same class, have arrived or left." At Pana the defendant's railroad is crossed by the C. & E. I., the B. & O. and the Big Four; the Big Four crossing is between two hundred and three hundred feet south of the B. & O. crossing, and is the most southerly of these crossings. A telegraph office and a tower for managing the interlocking system is at the Big Four intersection. The machinery for the tower plant is in the first story of this building, the telegraph office in which was the train register is in the second story and the tower man is in the third story. The interlocking plant has two signals which are controlled by the tower man; the telegraph operator has nothing to do with the signals. When plaintiff's train arrived at the B. & O. crossing, the home signal was set against train 913. The train stopped and plaintiff got off the caboose and had started towards the crossing and the telegraph office, when the engineer whistled and the plaintiff says that he looked at the signal and seeing it was clear got back on the train without going to the office to register and the train proceeded on south past Oconee and two miles south of there a collision occurred with an extra

going north. Plaintiff was asked this question, "Didn't you know it was your duty under the rules to go up in the second story and personally register?" He answered, "Yes, sir." He was also asked, "Didn't you know, when you went up there to register, that if there were any orders for you, it was the duty of the operator to give them to you? Didn't you know that?" His answer was "Yes, Sir." The train passed the registering station at from ten to twenty miles an hour. The evidence also shows that there was a custom to allow superior trains, those going north, if the conductor had special permission from the train dispatcher, to register by a slip, that is to throw a slip of paper giving the necessary information, as the caboose went by the office, to the operator who copied it into the register, but that there was no authority for any conductor to so register without the direction of the train dispatcher. Plaintiff undertook to show an habitual violation of the rule to register, and at his request the register book used for three months prior to the accident was produced and used in evidence and it did show that on several occasions while going north he had registered by a slip, but he only attempted to testify to one occasion during that time that he went south without personally registering, and he was not sure but that he was "deadheading" south at that time. The register book and the evidence of the plaintiff show conclusively that trains going south were always registered by the conductors personally. These registering stations are the stations to which orders are telegraphed and where, when the conductor goes to register, he gets his orders.

It is also undisputed that there was, when plaintiff's train passed Pana, an order there in the registering station, for the conductor of extra 913 south to meet and pass extra 593 north at Ocone. There is a conflict in the evidence as to whether the order board was or not set against the train, but that is not ma-

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terial. The rules in evidence and the custom as shown by plaintiff required the conductors of all southbound trains to personally register in the telegraph office, where they would get orders for their subsequent procedure. The conductors are in charge of the trains and the engineers are not required to register and are under the orders of the conductors; the engineer by whistling could not relieve the plaintiff of his duty of registering in the telegraph office and getting the order that was there for him.

Where in a personal injury case the plaintiff has violated a rule of the defendant designed for the protection of the employee and the patrons of defendant which, if the plaintiff had observed, he would not have been injured, this of itself is such contributory negligence as will preclude a recovery. *Elgin, J. & E. Ry. Co. v. Herath*, 230 Ill. 109; *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202; *Illinois Cent. R. Co. v. Winslow*, 56 Ill. App. 462. If the plaintiff at the time of the accident had been running a regular train south, his failure to observe the rules would have been such want of ordinary care as would defeat a recovery, and his failure to observe such rules while in charge of an extra train was much more culpable.

No judgment could be sustained on the evidence of plaintiff in connection with the rule of the Company with which he was familiar, because of his contributory negligence, and there was no error in the court instructing a verdict for the defendant. The judgment is affirmed.

Affirmed.

MR. JUSTICE PHILBRICK took no part in the decision of this case.

The People v. Preston, 188 Ill. App. 93.

The People of the State of Illinois ex rel. Stella Chaney, Appellee, v. Otis Preston, Appellant.

(Not to be reported in full.)

Appeal from the County Court of DeWitt county; the Hon. FRED C. HILL, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 5, 1914.

Statement of the Case.

Bastardy proceeding by the People of the State of Illinois, *ex rel.* Stella Chaney against Otis Preston charging defendant with being the father of a bastard child. To reverse a judgment entered on a finding in favor of plaintiff, defendant appeals.

LEMON & LEMON and HERRICK & HERRICK, for appellant.

A. F. MILLER and L. O. WILLIAMS, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. **BASTARDS, § 21***—*when evidence of intercourse with other men competent.* In a bastardy proceeding it is competent for the defendant to introduce evidence to show that the relatrix had intercourse with other men about the time she became pregnant, but such evidence must be limited to a period of time within which, in the course of nature, the child could have been begotten.

2. **BASTARDS, § 24***—*what may be asked of relatrix on cross-examination.* The relatrix in a bastardy proceeding may be asked on cross-examination whether she had intercourse with other men within the period in which the child could have been begotten.

3. **WITNESSES, § 239***—*when redirect examination improper.* Where the relatrix in a prosecution for bastardy in the County Court was asked on cross-examination if she had not testified to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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certain things at the preliminary examination before a justice of the peace, permitting counsel for the People to ask her on re-examination if she had not testified to other things before the justice that were not connected with the questions asked on cross-examination, *held* improper, since a re-examination should have been confined to such answers, if any, as were connected with and modified or explained the answers inquired about on cross-examination.

4. **BASTARDS, § 34***—*when instruction as to effect of change of name of relatrix properly refused.* In a prosecution for bastardy where it appeared the relatrix had procured a divorce under a different name, the refusal of a requested instruction telling the jury that if they believed such was her correct name they should find the defendant not guilty, *held* not error, where the evidence shows that she was known under the name in which she made the complaint, that she was known by such name and the proof corresponded with the complaint.

5. **BASTARDS, § 22***—*degree of proof to authorize verdict of guilty.* A prosecution for bastardy is a civil proceeding and a preponderance of the evidence is all the law requires to authorize a verdict of guilty, and where an instruction requires a clear preponderance of the evidence the court may properly modify it by striking out the word "clear."

6. **BASTARDS, § 34***—*when instruction as to effect of verdict of guilty improper.* In a prosecution for bastardy, instructions given at the request of the People informing the jury that a judgment of conviction only meant that the defendant would be compelled to pay the mother for the use of the child one hundred dollars for the first year and fifty dollars, for nine succeeding years, if the child lived that long, *held* argumentative and improper.

7. **APPEAL AND ERROR, § 1514***—*when remarks of counsel prejudicial.* Statement made in final argument by counsel for the relatrix in a bastardy proceeding that "if a man would debauch a daughter of mine as this man debauched this woman, there wouldn't be any jury to pass upon that question," etc., *held* inflammatory and prejudicial.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William J. Hall, Appellee, v. Chicago & Alton Railroad Company, Appellant.

1. MASTER AND SERVANT, § 704*—*when recovery for injury to section hand caused by a kicked car sustained by the evidence.* In an action by a section hand against a railroad to recover for personal injuries received, caused by a locomotive kicking a car on a switch track where he was employed in gathering up scrap iron, *held* that a verdict for plaintiff was not manifestly against the weight of the evidence.

2. MASTER AND SERVANT, § 152*—*when kicking cars constitutes negligence.* Kicking cars and running switch engines and cars in railroad yards without giving adequate warning of their approach constitute negligence.

3. DAMAGES, § 115*—*when verdict for personal injuries excessive.* A verdict in a personal injury case for two thousand five hundred dollars *held* excessive where the only wounds found on plaintiff were a cut on the head about two inches long and a bruise on his leg, and it appeared that he was able to do some work a week after the injury and soon thereafter to do the work of a farm hand, and that many of the troubles from which he suffered at the time of the trial were existing before he received the injuries sued for.

4. APPEAL AND ERROR, § 1500*—*when presence of family of plaintiff in court room prejudicial.* The presence of the wife and children of plaintiff in the court and their attraction of the attention of the jury during arguments of counsel and while the court was reading instructions to the jury, *held* prejudicial.

5. APPEAL AND ERROR, § 1514*—*when statements of counsel in argument prejudicial.* Conduct of counsel in his closing argument to the jury in making a reference to the defendant Railroad Company as a soulless corporation and stating that "this great corporation, with its power of driving machinery by steam, sends a car down that injures and maims this man," *held* prejudicial error, and its effect not cured by the court sustaining an objection to the statements and warning counsel to keep within the record, nor by counsel immediately apologizing for making them.

6. APPEAL AND ERROR, § 569*—*when improper argument of counsel cannot be excepted to.* Reference by counsel for plaintiff in his argument that plaintiff was a married man with two or three children, though irrelevant and improper, cannot be excepted to where there was evidence in the record as to plaintiff's domestic relations, to which there was no objection made.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Hall v. Chicago & Alton R. Co., 188 Ill. App. 95.

Appeal from the Circuit Court of Tazewell county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 5, 1914.

W. R. CURRAN, for appellant; WINSTON, PAYNE, STRAWN & SHAW, of counsel.

POTTS, CONAGHAN & POWERS, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an action in case by which appellee seeks to recover from appellant damages for personal injuries sustained by him averred to have been caused through the negligence of its servants while he was in its employ. The jury returned a verdict finding appellant guilty and assessing appellee's damages at two thousand five hundred dollars. From a judgment rendered on that verdict this appeal is prosecuted.

The declaration consists of several counts. One count avers, in substance, that the appellee was an employee of appellant required to work under the direction of a section foreman among its railroad and switch tracks in the village of San Jose and to gather rubbish and iron on its right of way; that while at work removing a drawbar thrown from its cars on the right of way, and in the exercise of due care for his own safety, a locomotive and train of cars was driven upon the main track through said village until it reached the end of the switch track on which appellee was working, and that appellee's servants, who were not fellow-servants of appellee, then detached a car from the train and negligently drove said car on said switch track striking and injuring appellee. Another count avers that the car detached from the train was negligently driven on the switch track without a brakeman thereon or any means of control, and another count avers that the detached car was negli-

gently forced on the switch track without sounding an alarm or giving any signal.

It is contended by appellant that the judgment cannot be sustained for the reason that the evidence does not show that the appellee was in the exercise of due care when he was injured and that there was no negligence on the part of appellant. There have been three jury trials in this case, on the first the jury found the defendant not guilty, in the second the jury disagreed, and this appeal is from the judgment on the third trial. The evidence shows that the appellee was a section man of appellant working on its tracks at San Jose; that it is the duty of the section men to gather up scrap iron along the right of way and place it on a scrap iron stand at San Jose from which it is loaded into a car once a month. There are three tracks running from the northeast to the southwest through the village. The most northwesterly of these is known as the P. & N. track, the center track is called the High Line or main track and the southeasterly is the switch or house track. The tool house in which is kept the hand car with the tools used by the section men stands a few feet south of the switch track. The right of way has no obstructions on it north and east of the tool house. A short distance southwest of the tool house is the scrap iron stand, which is a platform about six by eight feet and four inches high. The freight house is about two hundred and fifty feet southwest of the scrap iron stand and on the same side of the switch track. May 5, 1910, the date of the accident, was scrap iron day and early in the forenoon of that day the section foreman had directed that the car should be loaded that afternoon. The section men gathered scrap iron during the forenoon, and after dinner the foreman with appellee and one Lough went with the hand car about 1,200 feet to the southwest end of the yard to get a drawbar. The hand car with the drawbar on it was taken on the main line to opposite the scrap

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pile; the drawbar was carried by the three men over between the east rail of the switch track and the scrap iron pile and placed about four feet east of the east rail, and the hand car was put in the tool house. In the drawbar was a knuckle that was to be taken out so as to make the bar lighter to load. Appellee said to the foreman that the drawbar "is not in the clear it is not safe," and the foreman replied, "do you want to throw it over the right of way fence?"

While the men were at work on the drawbar a freight train came in from the southwest. The locomotive was uncoupled and backed on the switch track from the southwest to the freight house, past the men working on the drawbar, to get three cars, and then went back by the men with the three cars past the switch stand at the southwest end of the switch track. Appellee went to the tool house and got a spike maul to try and knock the knuckle loose, and after striking it a few times was standing in a stooping position near the track watching the other two men working with the drawbar, when the locomotive kicked two cars in from the northeast on the main line and the third car on the switch track. This car struck appellee and caught his clothing in such a way that he was dragged a short distance before it stopped, and by the striking and dragging injured him. The locomotive was between two and three hundred feet northeast from where the car struck appellee. There is a conflict in the evidence as to whether or not the bell was ringing on the engine or there was a brakeman on the car that struck appellee and as to the speed the car was running when it struck him.

While there may be a preponderance of evidence that there was a brakeman on the car and that the bell was ringing and that the car was running very slowly when it struck appellee, we are not able to say as a matter of law that the servants of appellant were not guilty of negligence, or that it was not shown that ap-

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appellee was in the exercise of due care at the time he was injured. "The practice of kicking or dropping cars and running switch engines and cars in railroad yards without giving adequate warning of their approach to employees engaged in the performance of their duties, clearly constitutes negligence." *Adams v. Cleveland, C., C. & St. L. Ry. Co.*, 243 Ill. 191, affirming 149 Ill. App. 574; *Chicago Junct. Ry. Co. v. McGrath*, 203 Ill. 511; *Pittsburg, C., C. & St. L. Ry. Co. v. Bovard*, 223 Ill. 176. The case is one where it cannot be said that all reasonable minds would agree from the evidence in the record that the appellee was not in the exercise of ordinary care and the issues were therefore properly submitted to a jury for their determination; neither can it be said that their conclusions thereon are clearly and manifestly against the weight of the evidence, and therefore this court is bound by their findings on those questions.

The appellee was taken to a physician and the only wounds found on him were a cut an inch and a half or two inches long on his head and a bruise on his leg. The skull was not fractured nor any bones broken. He did not require any treatment after May 8th, although he visited the physician at his office until two weeks after the receipt of the injury. He however claimed at the time of the trial to be suffering from varicose veins, pain in the back and headache. The proof also shows that before the time of his injury he complained that he was suffering from pains in his side and the small of his back and that he exhibited his urine to his fellow-workmen to show that he was passing yellow matter, and that before the injury he had been treated by a physician for cystitis or inflammation of the bladder. The evidence also shows that in a week after the injury he was at work in his garden and he admitted that he worked on a farm at regular wages plowing corn in June and did the ordinary work of a farm hand substantially all that summer and the

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following spring and summer. Upon a review of all the evidence in the case we conclude that before the receipt of the injuries sued for, the appellee was suffering from many of the troubles of which he now complains, and that the damages awarded are excessive and that the cause should be submitted to another jury.

It is also assigned for error and argued that counsel for the appellee in the closing argument to the jury made improper and inflammatory statements calculated to predudice the jury and inflame them against the appellant; and that the wife of the appellee and two children, one of them an infant, were present in the court and attracted the attention of the jury during the arguments of counsel and while the court was reading the instructions to the jury to such an extent that the court requested the wife of appellee to take the children from the room.

Among other things said by counsel in his closing argument to the jury were: "Charles Bright is a man, to whom the finger of scorn cannot be pointed at by the soulless corporation, the Chicago & Alton Railroad Company * * *. No gentlemen of the jury, but this great corporation, with its power of driving machinery by steam, sends a car down that injures and maims this man." Counsel also referred to appellee as a married man with two or three children. Appellant had offered evidence that appellee was a man with a family, and appellee on cross-examination, without any objection thereto, showed that he had a wife and two children. There being evidence in the record as to appellee's domestic relations, to which there was no objection, the argument of counsel while it was irrelevant and improper cannot be excepted to in that regard. Counsel for appellee do not contend that the statements complained of were not improper, but their only reply is that the trial court having ruled that the statements were improper, appellant has no reason to

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complain further. Although the court ruled that the statements of counsel hereinbefore referred to, with others to which objections were made, were improper and warned counsel to keep within the record, and counsel in most instances immediately apologized for making them, yet neither the ruling of the court nor the apologies of counsel can remedy the injurious and prejudicial effect of such improper appeals for sympathy and inflammatory statements. *Chicago Union Traction Co. v. Lauth*, 216 Ill. 183; *Parlin & Orendorff Co. v. Scott*, 137 Ill. App. 455. The improper argument to the jury and staging of the case probably influenced it in arriving at its verdict, not only as to the amount but possibly otherwise. For the reasons indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

**Frank K. Lemon, Defendant in Error, v. Richard Snell,
Plaintiff in Error.**

(Not to be reported in full.)

Error to the Circuit Court of DeWitt county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914.

Statement of the Case.

Action by Richard A. Lemon and Frank K. Lemon, partners, against Richard Snell to recover attorneys' fees for services performed for defendant in litigation concerning the estate of Thomas Snell, deceased. After the suit was begun, Richard A. Lemon died and the suit was prosecuted in the name of Frank K. Lemon, surviving partner.

The claim of plaintiffs is for \$15,000 for services rendered in the contest of the will of Thomas Snell, in which suit plaintiffs were attorneys for Richard Snell, contestant, and for \$5,500 for services rendered

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in the estate for defendant as administrator after the suit to contest the will was terminated. A jury returned a verdict in favor of plaintiff for \$1,750, on which judgment was rendered. To reverse the judgment, defendant prosecutes a writ of error.

STONE, OGLEVEE & FRANKLIN, for plaintiff in error.

HERRICK & HERRICK, for defendant in error.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. ATTORNEY AND CLIENT, § 134*—*admissibility of evidence*. In an action to recover attorneys' fees permitting plaintiff to testify as to the value of services which had been rendered and paid for under an express contract, and permitting him to testify that a claim was made for further compensation for the services and that defendant had made an offer to give \$1,500, *held* error, for the reason that defendant had settled for such services and that the offer to pay a further sum was a promise to make a gift for which there was no consideration.

2. ATTORNEY AND CLIENT, § 127*—*when amount of compensation not excessive*. In an action for attorneys' fees, a verdict for \$1,750 *held* not excessive where the amount involved was large, and the questions in issue were bitterly contested and a clear preponderance of the evidence would have justified a larger verdict.

3. APPEAL AND ERROR, § 1489*—*when admission of improper evidence afterwards excluded not prejudicial*. In an action to recover attorneys' fees, the admission of improper evidence which was afterwards excluded, *held* not prejudicial as influencing the jury to allow an excessive verdict where it appears that the jury on a consideration of the proper evidence could not have returned a verdict for a less amount.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William R. McCoy, Appellee, v. Chicago & Alton Railroad Company, Appellant.

1. MASTER AND SERVANT, § 721*—*when existence of fellow-servant relation is question of law for the court.* Whether the evidence establishes the relation of fellow-servants within the definition thereof is ordinarily a question of fact for the jury, and it is only when the facts are undisputed, or so conclusively shown that reasonable minds must reach the same conclusion therefrom, that the court is privileged to pass upon it as a question of law.

2. MASTER AND SERVANT, § 577*—*burden of proving relation of fellow-servants.* The burden of proving the relation of fellow-servants existed is upon the master even though such relation is negatived in the declaration.

3. MASTER AND SERVANT, § 350*—*assumption of risk.* A servant does not assume, as an incident to his employment, the risk and hazard of the negligence of other employees not his fellow-servants.

4. MASTER AND SERVANT, § 729*—*when question whether members of switching crews are fellow-servants for jury.* Whether members of different switching crews are fellow-servants, held under the evidence to be a question for the jury.

5. MASTER AND SERVANT, § 759*—*when position of switchman on car not contributory negligence as matter of law.* Where a foreman of a switching crew was riding on the end of a steel hopper car and his legs were injured by coming in contact with a car, which was setting on a switch track and was not in the clear, held that the position in which he was riding and his failure to see the car on the switch track was not contributory negligence as a matter of law, but that such question was for the jury.

6. MASTER AND SERVANT, § 611*—*admissibility of evidence.* Objections to questions which simply called for conclusions of a witness and his reasons for not warning plaintiff of his danger and an objection to an offer to prove what the witness assumed plaintiff would see and what the supposed plaintiff would do, held not erroneously sustained.

7. MASTER AND SERVANT, § 796*—*when requested instruction properly refused as inapplicable to pleading.* Requested instructions telling the jury, in substance, that all the members of the switching crew of which plaintiff was foreman were fellow-servants and that if the negligence of any member thereof was the proximate cause of the injury plaintiff could not recover, held properly refused, where the gravamen of a count in the declaration was the negligence of de-

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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fendant in employing an incompetent servant as a member of the switching crew.

8. **MASTER AND SERVANT, § 796***—*when requested instruction properly refused.* Requested instructions stating that plaintiff cannot recover if his injuries were caused by the negligence of fellow-servants, *held* not improperly refused, where no instruction was given or offered attempting to define what constitutes the relation of fellow-servants.

9. **DAMAGES, § 122***—*when \$15,000 for injury to both legs not excessive.* A verdict of \$15,000 for an injury to the legs of a foreman of a switching crew *held* not excessive, where the flesh of his left leg was more or less torn from above the knee to the ankle and both bones of right leg were broken below the knee, and necessitated amputation five inches below the knee.

10. **APPEAL AND ERROR, § 1633***—*when improper remarks of counsel not reversible error.* Improper remarks of counsel in his argument *held* not to be of such a character as to be cause for reversal, where an objection to the remarks was sustained, the jury instructed to disregard them and counsel disclaimed before the jury any intention to mislead them.

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the October term, 1911. Affirmed. Opinion filed May 5, 1914. Rehearing denied June 25, 1914. *Certiorari* allowed by Supreme Court.

BRACKEN & YOUNG, for appellant; SILAS H. STRAWN, of counsel.

DEMANGE, GILLESPIE & DEMANGE, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Appellant prosecutes this appeal to reverse the judgment of the Circuit Court entered against it in favor of appellee for \$15,000, in an action on the case for personal injuries.

The declaration consists of four counts. The first alleges, with the usual and necessary averments, in substance, that appellant by its servants, not fellow-servants of appellee, negligently placed a flat car on a switch track in such close proximity to the intersec-

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

tion thereof with another track that cars passing over the latter could not clear said flat car, and by reason of which appellee, while riding on a car traveling over the latter track in the performance of his duties, using due care for his own safety, was crushed between the car on which he was riding and said flat car and injured. The second count alleges in substance that there was a rule or custom of the members of the switching crew operating in appellant's yards to warn each other of such dangers, of which rule and custom appellant had notice, and that appellant negligently employed an incompetent switchman who did not know of such rule and custom, and who saw the danger but negligently failed to warn appellee thereof. The third and fourth counts are substantially the same as the first count. The plea of general issue was filed to the whole declaration.

The points most seriously urged by appellant are, that appellee was guilty of contributory negligence, that he assumed the risk and that the negligence in placing said flat car in such position was that of fellow-servants.

The questions of contributory negligence and assumed risk under the facts in this case are closely allied, and a proper disposition of them suggests first the consideration and determination of whether the evidence establishes as a matter of law that the negligence which caused the injury was that of fellow-servants.

The city of Bloomington is the junction point of the Chicago, Kansas City and St. Louis branches of appellant's railroad system. Extensive switch yards are there located for the purpose of assembling and breaking up trains of cars which arrive from the west, northeast and southwest over these different branches. These switch yards extend from a point somewhat south of Bloomington north for a distance of about three

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and a half miles to a point near the town of Normal. They are located on either side of the main tracks of appellant's road and at some points are fifteen tracks in width. They are divided into what are designated as the east and west yards and are commonly called in the testimony train yards. From these train yards also extend switch tracks running to numerous private industries located in the vicinity thereof. The switching in the train yards is usually performed by two switch engines each manned with a switching crew, called a train yards crew. One engine and crew operate in the east train yard and one in the west train yard. A third, or extra train yards engine, spoken of as a tramp engine, and crew, at times assists the two regular train yards engines and crews in both the east and west yards, and is also used in hauling cars of merchandise to the private switch tracks of the various Bloomington industries located along appellant's right of way. This latter work is commonly called outside work. All the train yards crews worked under the orders of the yardmaster, John Connors, and the superintendent of transportation, Patrick Mulhern.

North and west of the train yards at the western limits of Bloomington appellant maintains and operates the principal repair shops of its system. They consist of many large buildings and in connection therewith are independent switch yards, which are commonly called shop yards. The shops and shop yards cover approximately eighteen or twenty blocks in area. The switching in the shop yards is performed by a switch engine with a crew called the shop yards crew. This crew works under the orders of the superintendent of machinery, Patrick Maher. The shop yards are connected with the train yards by a single track or lead, which runs from the west train yards to the gate at the shop yards, at which point it connects with the tracks of the shop yards.

There is evidence tending to show that when cars were received in the train yards destined for the shop yards, a train crew would place such cars on the shop yards lead, near the entrance to the shop yards, from which place the shop yards crew would take them to the shops within the yards; that at such times it was unnecessary and unusual for the two crews to meet. The evidence further tended to show that when cars were to be delivered from the shops to the train yards, they were set out on the tracks by the shop yards crew, which acted independently of the train yards crews, and that this was usually done when the latter crews were in distant parts of the train yards; that occasionally when cars of material were needed in the shop yards, and their delivery by the train yards crews was delayed, the shop yards crew would take them from the train yards to the shops; that the shop yards crew spent almost all of its time within the shop yards; that the train yards crews performed no duties in the shop yards, nor with the shop yards crew, and *vice versa*; that there was no rule or regulation of appellant governing a mutual action of the crews of the two departments, and that these crews seldom met and when they did it was by mere chance. Occasionally in times of emergency, when the train yards crews were rushed with work, by special order, the shop yards crew assisted them, but at such times the shop yards crew became a train yards crew, and subject to the orders of the officers controlling the train yards, and did not act in its capacity as a shop yards crew.

One of the tracks in the train yards was called the McCarthy track. Another track therein, called old track No. 1, runs alongside of it for some distance and connects with it. The McCarthy track will hold but six average cars, and leave the cars in the clear.

On the morning of the accident six cars were standing on this track when the shop yards crew pushed a seventh car from the shop yards through the switch

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on to the south end of the McCarthy track. The north car of the six standing on the track was thereby moved north towards the junction of said track with old track No. 1 so that the northeast corner of said north car stood not more than eighteen inches from the west rail of old track No. 1. At this distance it would permit some cars to pass on the latter track, but would scrape the sides of others. The evidence further tended to show that it was the practice and custom to leave cars on the switch tracks so they would clear cars passing on adjoining tracks and that it was unusual not to do so. Of course, this must necessarily have been so or the business in the yards could not have been carried on.

Appellee generally was a member of the west train yards crew, but when it became necessary to use the extra or tramp engine he acted as foreman of the crew attached to that engine. On the morning in question he went to work at seven o'clock with the west train yards crew, and about nine o'clock, under orders, took charge of the extra train yards engine and crew, and while riding on the sill of a steel hopper car, which his engine was hauling on old track No. 1, with his back towards the car, his legs hanging over the sill and occupied in reading his written orders, as the hopper car passed the car on the McCarthy track his legs were caught and crushed between the corner thereof and the car on which he was riding.

It must be conceded that the leaving of the flat car on the McCarthy switch in the position mentioned by the shop yards crew was negligence, but appellant contends that the members of that crew and appellee were fellow-servants. Whether the evidence establishes the relation of fellow-servants within the definition thereof is ordinarily a question of fact for the jury to determine, and it is only when the facts are undisputed, or so conclusively shown that reasonable minds must reach the same conclusion therefrom, that the

court is privileged to pass upon it as a question of law. The burden of proving that such relation existed was upon the defendant, even though such relation is negatived in the declaration. *Chicago & A. R. Co. v. House*, 172 Ill. 601; *Hartley v. Chicago & A. R. Co.*, 197 Ill. 440. It has long been established as the law in this State that servants of a common master cannot be held to be fellow-servants, so as to absolve the master from liability for an injury to one caused by the negligence of another unless they directly co-operated with each other in a particular business as distinct from indirect co-operation of the general business of the master, or that their general duties must bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. *Lyons v. Ryerson*, 242 Ill. 409; *Linquist v. Hodges*, 248 Ill. 491. From the evidence in this case it cannot be said that all reasonable minds must come to the same conclusion that the relation of fellow-servants existed between said respective crews. Their duties were separate and distinct, they were operating under different departments and received their orders from different officers. The officers controlling the crews in one department had no control, authority or jurisdiction over the crews in the other department. The evidence also tended to show that in the performance of their respective duties they seldom met, and if they did it was by chance and not by reason of any direct co-operation in any particular business. At least it was not undisputed that there was a direct co-operation between them, nor that in the performance of their duties they were brought into habitual association. It was for the jury to determine from all the evidence, as a question of fact, whether such relation existed, and its verdict is conclusive on this question in this court. The facts in this case are substantially analogous to those in the case of *Hartley v. Chicago & A. R. Co.*, *supra*.

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The jury having found that the relation of fellow-servants between appellee and the members of the shop yards crew did not exist, the contention that appellee assumed the risk of the negligence of the latter crew in leaving the car in the place in question cannot be sustained. Appellee did not assume, as incident to his employment, the risk and hazard of the negligence of other employees of appellant, who were not his fellow-servants. *Illinois Third Vein Coal Co. v. Cioni*, 215 Ill. 583.

It is further insisted that appellee was guilty of contributory negligence, (1) in taking the position he did on the hopper car; (2) in failing to see the flat car on the McCarthy track; (3) in failing to hear the warnings given; (4) in examining his orders and failing to anticipate the danger and be on the lookout therefor.

When appellee was directed to take charge of the extra train yards crew as foreman he was ordered to place certain cars then in the train yards on the private switches of certain industries to which they were consigned. These orders were written on pieces of cardboard and informed him where the cars would be found in the yards and to whom consigned. At the same time he was verbally ordered by the yard-master, Connors, to first take five cars of coal to the coal chute to be used by the engines of the transportation department. Appellee proceeded with his engine to the place where he was to get the coal cars, and after he and his crew had done the switching necessary to separate the five coal cars wanted from the others to which they were attached, his engine hauling said coal cars proceeded slowly south over old track No. 1 towards the McCarthy track. Appellee mounted the last car as it passed him. This was a steel hopper car with a large open space under each end. Appellee sat underneath the hopper on the sill at the end of the car with his legs hanging down on the outside over the sill, and proceeded to

examine the cards containing his orders as to the outside work he was to do immediately after leaving the coal cars at the chute. While thus occupied his train approached the McCarthy track, and when he reached the flat car standing on that track his legs were caught and injured.

There is evidence tending to show that appellee in the work of getting out the coal cars looked south in the direction of the McCarthy track, and that a man by the name of Marhl standing some distance away, also another man, one of his own crew, shouted to him as he approached the McCarthy track. Appellee testified that he at no time saw the position of the flat car on the McCarthy track, nor heard any warnings until he was almost to said car when he tried to throw up his legs, but the car caught them before he could avoid the danger.

The law did not require appellee to ride on any particular car, nor in any particular part of any car. All that he was bound to do was to use such ordinary care for his safety in the performance of his duties as a reasonably prudent person would use under the same circumstances. His position on the car did not unnecessarily expose him to any of the usual, ordinary or known risks or hazards of his employment. He had a right to assume that the shop yards crew had not negligently left any cars too close to the track over which he was traveling. It was not negligence *per se* for him to ride in said position, neither was it for him to fail to see the car, to hear the warnings nor to read his orders. Whether these facts in this particular case constituted negligence on his part which contributed to his injury was a question for the jury to determine by considering them in connection with all the other facts and circumstances shown by the evidence, and we cannot hold that he was guilty of contributory negligence as a matter of law.

The only criticism made to the court's rulings on the admission of evidence is to the sustaining of objec-

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tions to six questions propounded to the witness Ryan. All these questions simply called for conclusions of the witness, and his reasons for not warning appellee of his danger. Following these objections appellant made a long offer of proof to which an objection was sustained. By this appellant offered to prove what the witness *assumed* appellee could see, and what he *supposed* appellee would do. There was no error in sustaining the objections to said questions or to the offer of proof.

The assignment of error in regard to the instructions is confined to the refusal of the court to give the fifth, sixth, seventh and tenth offered by appellant. The fifth instructs the jury in substance that all the members of the switching crew, of which appellee was foreman, were fellow-servants, and that if the negligence of any member thereof was the proximate cause of the injury, appellee could not recover. The gravamen of the second count of the declaration was the negligence of appellant in employing an incompetent servant as a member of his switching crew. The instruction goes to the whole declaration, and was inapplicable to the second count. The sixth, seventh and tenth all state that appellee cannot recover if his injuries were caused by the negligence of fellow-servants. No instruction was given or offered attempting to define what constitutes the relation of fellow-servants. The definition of fellow-servants is for the court, and it is for the jury to find whether the relation exists within the definition, from the facts proven. *Hartley v. Chicago & A. R. Co., supra*. These instructions leave it for the jury to determine who, as a matter of law, might be fellow-servants. It is error to give such instructions without defining the meaning of fellow-servants. *Chenoweth v. Burr*, 242 Ill. 312. The court properly refused them.

The evidence tended to show that the flesh of the left leg was more or less torn from above the knee

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to the ankle, and that both bones of the right leg were broken below the knee. Several efforts were made to make the bones of the right leg unite by wiring them together, but these operations were unsuccessful. Effort was made to cause them to knit by irritation, with a similar result. Silver plates were then used to attach the broken ends together, and these did not succeed. Finally the leg was amputated five inches below the knee. During these various operations appellee was confined to the hospital from time to time about thirty weeks. The evidence further tends to show that the left leg also became weak, and that at the time of the trial, twenty-two months after the injury, it was necessary to wear braces thereon, and the use of a wheeled chair was the only means by which appellee could get about. He was thirty-five years of age, earning about \$100 per month at the time of his injury, and up to the time of the trial had been unable to work. The verdict is large, but the injuries are severe, and we do not think under all the evidence the damages are excessive.

Criticism is made to some of the remarks of counsel for appellee in his argument to the jury. The remarks objected to were improper, but the court promptly sustained an objection thereto and the jury were instructed to disregard them, and counsel disclaimed before the jury any intention of attempting to mislead them thereby, and we do not think they were of such character that, under these circumstances, should cause a reversal of the judgment.

The judgment of the Circuit Court will be affirmed.

Affirmed.

Clark v. Fraternal Tribunes et al., 188 Ill. App. 114.

Laura Clark et al., Appellants, v. Fraternal Tribunes and Northern Life Insurance Company of Illinois et al., Appellees.

INSURANCE, § 24*—*when evidence insufficient to show consolidation or conspiracy to defeat insurance claims.* On a bill filed by members of a fraternal insurance company against such company and a life insurance company charging a conspiracy on the part of the officers of the two companies to defraud complainants of their insurance claims, evidence held insufficient to show a consolidation of the two companies or to show such fraudulent conspiracy, it appearing that the life insurance company received nothing from the fraternal insurance company except a small increase in policy holders from its members.

Appeal from the Circuit Court of Sangamon county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the October term, 1912. Affirmed. Opinion filed May 5, 1914. Rehearing denied June 25, 1914. *Certiorari* denied by Supreme Court (making opinion final).

GEORGE W. KENNEY and A. G. MURRAY, for appellants; EUGENE E. BONE, KAPLAN & KAPLAN, ALONZO HOFF, ROBERT MATHENY, GRAHAM & GRAHAM, BARBER & BARBER, SMITH & FRIEDMEYER, HAMILTON & CATRON, C. F. MORTIMER, BELLATTI, BARNES & BELLATTI, B. O. SUMNER, MORPHY, EWING & BRADFORD, E. L. CHAPIN, SAMPSON & PUTTING, A. C. EDIE, CHARLES HARRIS, WILLIAM B. RISSE, WILSON & WALL, MATHEW J. HUSS, A. W. FULTON, R. WOLFNER, SAFFORD & GRAHAM, C. I. MCNETT, THOMAS P. REEP, CHARLES H. WOODBURN, SNOW & HAIGHT, B. O. WILLARD and MANLEY & KRAMER, of counsel.

GILLESPIE & FITZGERALD and BARRY & MORRISSEY, for appellees.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

This appeal seeks to reverse the decree entered in said cause in the court below dismissing the bill of appellants for want of equity. The American Home Circle was a fraternal beneficiary society organized under the laws of this State in 1897 and engaged in fraternal insurance business. The Fraternal Tribunes was also a fraternal beneficiary society organized in the same year under the laws of this State and engaged in fraternal insurance business. In November, 1908, the officers of the Circle sought a consolidation of that association with the Tribunes and furnished a statement to the latter showing that the Circle had assets on hand amounting to practically \$19,000, and that its current death losses and other liabilities amounted to about \$35,000. On November 19, 1908, a contract was entered into between the Circle and the Tribunes whereby the members of the Circle were reinsured in the Tribunes and the Tribunes assumed the obligations of the Circle. As a matter of fact at this time the Circle had no assets and had liabilities of about \$125,000. The Tribunes at this time was solvent and had an accumulated surplus in an emergency fund of \$57,000. After the merger of the two associations was consummated the old officers of the Tribunes resigned and the officers of the Circle were elected in their places, and certificates of membership in the Tribunes were issued to the members of the Circle. The \$57,000 in the emergency fund of the Tribunes was drawn out by the new administration of that association and was fraudulently used in some manner unexplained. In July, 1909, an attempted dissolution of the Circle and Tribunes was made and the then officers of the Tribunes resigned and new officers were elected, and it was found that in addition to the loss of the \$57,000 in the emergency fund there was a further shortage in the treasury of the Tribunes of over \$12,000. The new officers attempted to collect the said amounts from the retiring officers of the Tribunes and succeeded in collecting \$48,500 in cash, took

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a note for \$8,500 from Dr. Craig, the former medical examiner, which proved to be of no value, and had to charge off the sum of \$12,136 against the ex-treasurer. All of the appellants, with one exception, are beneficiaries under policies originally issued by the Circle and the total of their claims amounts to about \$100,000. Many of these claims accrued prior to the merger of the two associations.

The Tribunes continued in business until about March 21, 1910. Suits had been commenced against the Tribunes by the beneficiaries under the certificates issued by the Circle claiming an aggregate amount of over \$80,000. In several of these suits judgments had been rendered against the Tribunes. By reason of these conditions and the exhaustion of the funds of the Tribunes it became impossible for the Tribunes to defend the suits so instituted against it, to furnish bonds to appeal from the judgments, or to meet its obligations, or continue in business, and in the opinion of its officers a receivership for the Tribunes was inevitable. An effort was made to provide the living members of the Tribunes with reinsurance, and negotiations were had with the appellee, the Northern Life Insurance Company of Illinois, which is an old line legal reserve insurance company, organized under the laws of this State. The officers of the Tribunes and the Northern Life sought the advice of the insurance superintendent of the State and were informed by him that there would be no objections to the Northern Life insuring the members of the Tribunes as individuals, but that under the laws of this State there could be no consolidation between the two corporations and also that the Northern Life would not be authorized to consolidate with an insolvent corporation and assume its liabilities.

At a meeting of the Supreme Tribunal of the Tribunes the president of the Northern Life, in an oral

statement to that body, explained the different forms of policies offered by said Company and that the Northern Life would not require a medical examination of any of the members of the Tribunes if all, or nearly all, would insure in the Northern Life; that he would offer such members rates of insurance from \$2 to \$4 lower than the average because the Company would not be at the expense of paying commissions and that the members could pay their usual assessment for the month of April, and further stated that he had been advised by the insurance department that in order to protect the Company, if a member would not submit to an examination, it would be necessary to retain a lien upon his policy. The Supreme Tribunal passed a resolution urging the members to accept the proposition of the Northern Life. Following this meeting the Northern Life sent a circular to the members of the Tribunes stating, among other things, as follows:

“6. You are not compelled to take a medical examination but if you do not take it, or are not able to pass, your policy will be scaled for the first few years. The amount payable on a \$1,000.00 policy, in case you do not pass the medical examination will be \$600.00 the first year, \$650.00 the second year, \$700.00 the third year, and so on up to \$1,000.00. Understand that you can take a medical examination, at our expense, and have insurance for the full \$1,000.00 right from the start.

7. The Northern Life offers to insure your entire membership whether sick or well. But it cannot take care of your sick unless your well people come too. To take the sick without the well is unfair and impossible.

Get examined at once, at the Company's expense. If you fail to pass, we will accept you anyway as soon as two-thirds of the members of your Tribunal have accepted our proposition.

Your insurance takes effect as soon as it is approved in the Home Office of the Company, without waiting

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for the policy to reach you. You can pay monthly, quarterly, semi-annually or annually as you please. It costs you not a penny extra to have The Northern Life issue you this policy and carry your protection for the month of April. After that your rate will be such as is indicated in the table in this folder. * * *

15. If you have paid in advance, send in the card and The Northern will carry your insurance from April 1st to such date as your advance payments will carry you at the new rate."

At this time a number of members of the Tribunes had made advance payments on their policies to the amount of about \$4,000. To protect these advance payments the Supreme Tribunal transferred to the Northern Life by bill of sale all its personal property consisting of office furniture, etc., of the value of about \$1,000, and the Craig note for the nominal consideration of \$4,000. The bill of sale provided that the same should apply and be credited on the insurance of those members of the Tribunes who had paid in advance of the month of March. Numerous circulars, postal cards and letters were mailed by the Northern Life and the Supreme Tribunal to the members of the Tribunes explaining the proposition of the Northern Life and urging said members to accept the same. About ten per cent. of the members of the Tribunes accepted policies in the Northern Life, all of whom submitted to and passed a medical examination.

The bill alleges many of the above facts and others, and charges a conspiracy on the part of the officers of the two corporations to defraud appellants of their claims, and that by reason of the facts alleged the Northern Life became liable to appellants for the amounts of their respective claims. The bill does not charge in words that the two corporations became consolidated, but the contentions of appellants are: First, that there was a consolidation by virtue of the statute; second, that if there was not a statutory con-

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solidation there was a consolidation in fact and that the appellee, the Northern Life, having received the benefit of such consolidation, is estopped from denying the consolidation; and third, if there was neither a statutory consolidation nor one in fact, still all the appellees are liable to appellants on the theory of the commission of a tort by appellees in fraudulently disrupting the Tribunes and thereby depriving appellants of their means of making their claims.

There is no basis for the contention that there was a statutory consolidation. Even if the Northern Life and Tribunes had the power to consolidate under the laws of this State, no attempt whatever was made to comply therewith and it is unnecessary to discuss this phase of the question.

We do not think the proof shows there was a consolidation in fact. No contract was entered into between the two corporations. While the Northern Life offered to issue policies to all the members of the Tribunes it was upon the condition that all, or nearly all, or at least two-thirds of the latter, would apply for policies in that Company. Only a small proportion of the Tribunes' membership applied for policies in the Northern Life. It is earnestly insisted that the transfer of the personal property above mentioned is strong evidence of such a consolidation. This property, as above stated, was of small value and was given to protect the members of the Tribunes who had made advance payments on their assessments. The Craig note was worthless and the other property did not exceed the value of \$1,000. After the bill in this case was filed, appellants, or some of them, filed another bill asking for the appointment of a receiver for the Tribunes and said receiver was appointed and said personal property reconveyed to the Tribunes, and by it turned over to the receiver, so, as a matter of fact, the Northern Life received nothing from the Tribunes except the value of the new business acquired

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by issuing policies to a small portion of its members. It would be an anomalous situation to hold that there was a consolidation between these two companies while there was a receiver administering the estate of one of them, who had possession of all of its assets.

We are of the opinion that proof is not sufficient to show that there was a fraudulent conspiracy on the part of the Northern Life and the Tribunes to deprive appellants of their claims. The Northern Life has received nothing from the Tribunes except a small increase in policy holders from its members. The proof does not show the loss of these members has to any extent jeopardized the rights of appellants in collecting their claims, and, even if it did, such fact would not be a basis for liability against defendants. *Twiss v. Guaranty Life Ass'n*, 87 Iowa 733.

The record in this case is very voluminous and we have not attempted to mention all the facts appearing therein, nor to discuss all the points raised in appellants' brief and argument, but have commented on only such as appear to be most material and controlling. After a careful consideration of all the evidence and the points raised in regard thereto, we are of opinion that the proofs do not sustain the allegations of the bill and that the decree entered in the court below dismissing the bill for want of equity is proper, and it will therefore be affirmed.

Affirmed.

Passwaters v. Lake Erie & Western R. Co., 188 Ill. App. 121.

Emma Passwaters, Administratrix, Appellee, v. Lake Erie & Western Railroad Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLSTON D. MYERS, Judge presiding. Heard in this court at the April term, 1913. Affirmed. Opinion filed May 5, 1914.

Statement of the Case.

Action by Emma Passwaters, administratrix of the estate of Irma Passwaters, deceased, against the Lake Erie and Western Railroad Company to recover damages for the death of Irma Passwaters, a girl about eight and one-half years of age, who was killed at a highway crossing by one of defendant's trains, while riding in a buggy with her father, Charles A. Passwaters. The trial court entered judgment in favor of plaintiff on a verdict of the jury assessing the damages at three thousand three hundred dollars. To reverse the judgment, defendant appeals.

An action was brought by the administratrix of the estate of the father to recover damages for his death, which occurred in the same accident. There was a verdict and judgment in favor of plaintiff in that case and the judgment was affirmed in the Appellate Court. See *Passwaters v. Lake Erie & W. R. Co.*, 181 Ill. App. 44.

JOHN E. POLLOCK and W. B. LEACH, for appellant;
JOHN B. COCKRUM, of counsel.

BARRY & MORRISSEY and SCHNEIDER & SCHNEIDER, for appellee.

MR. JUSTICE ELDBEDGE delivered the opinion of the court.

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Abstract of the Decision.

1. RAILROADS, § 696*—*sufficiency of declaration in action for death of child in care of father.* In an action for the death of a child who was killed at a highway crossing by one of defendant's trains while riding in a buggy with her father, failure of the declaration to allege the age of the deceased child, how and with whom she was riding, and that the father was in the exercise of due care, *held* not to render the declaration insufficient to sustain a verdict on account of variance between its allegations and the proof, since the child's age, how and with whom she was riding are simply evidentiary facts which need not be pleaded. and any negligence of the father which might be imputed to the child was sufficiently negatived by the averment of due care and caution on her part, as such averment would also necessarily imply due care and caution on the part of the father.

2. NEGLIGENCE, § 250*—*when giving of instruction requiring due care only on the part of child's father harmless.* In an action for the death of a child while in care of its father, where the case was tried on defendant's theory of the law that the father was negligent and that his negligence was imputed to the child, the giving of a modified instruction requiring the exercise of due care on the part of the father and not requiring due care on the part of the deceased child, *held* harmless where all the evidence showed that the child was in the exercise of due care.

3. APPEAL AND ERROR, § 1241*—*when adversary's instructions cannot be complained of.* Appellant cannot complain that the court modified appellee's instructions to conform to the theory of the law as presented by his own instructions.

4. APPEAL AND ERROR, § 1238*—*when appellant cannot complain of court's adoption of his theory of case.* Where appellant has induced the court to adopt a theory of the law most favorable to himself, he cannot on appeal insist that the court should have adopted some other theory.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Home State Bank of Lexington et al., Defendants in Error, v. James W. Vandolah et al., Plaintiffs in Error.

1. PARTNERSHIP, § 80*—*interest of partner in firm property.* The interest of partners in partnership property is not that of tenants in common, nor of joint tenancy, but is *sui generis* and peculiar to itself. Each partner has a joint interest in the whole, but not a separate interest in any particular part of the property.

2 PARTNERSHIP, § 86*—*right of partner to transfer his interest.* A partner cannot transfer an undivided interest in any specific articles belonging to the firm; he may assign its interest in a partnership to a third person, but such person does not thereby become a partner in the firm without the consent of the other partners.

3. PARTNERSHIP, § 201*—*effect of assignment of partner's interest.* An assignment by a partner of his interest in the firm to a third person, either by voluntary act or legal process; simply entitles such person to receive such partner's share of what may remain after a settlement of the partnership affairs and the payment of all debts. He takes nothing but a chose in action and the right to an accounting and simply becomes subrogated to the rights of the partner in the winding up and settlement of the partnership estate.

4. BANKS AND BANKING, § 68*—*powers of State bank.* Laws of this State do not permit State banks to buy interests in partnership firms and become partners thereof, nor to indulge in the commercial business of an electric light company.

5. PLEDGES, § 28*—*when pledge of partner's interest in firm gives lien prior to rights of judgment creditors.* Where a partner prior to the entry of judgments against him executed to a bank for a valuable consideration a bill of sale of his interest in the firm as collateral security for an indebtedness, the bank has a lien on such partner's interest paramount to the rights of the judgment creditors, whether they had notice of such pledge or not.

6. PARTNERSHIP, § 425*—*when improper finding in decree harmless.* Where a decree on a bill filed to settle and wind up a partnership contained a finding that a creditor of one of the partners was entitled to the whole of such partner's distributive share on the theory that there had been an absolute sale of his interest to the creditor, *held* such finding was harmless where the value of the partner's distributive share was insufficient to pay the creditor.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Home State Bank v. Vandolah, 188 Ill. App. 123.

Error to the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914.

SHELTON L. SMITH and WELTY, STERLING & WHITMORE, for plaintiffs in error.

BARRY & MORRISSEY, for defendants in error.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

This cause is based upon a bill in equity filed by defendants in error to settle and wind up a partnership, doing business under the firm name of Lexington Electric Light Company. The bill, in substance, avers that for some time prior to February 16, 1910, the partners in said firm were Charles P. Scrogin, Ella E. Vandolah and Emily S. Vandolah; that James W. Vandolah, husband of Ella E. Vandolah, was indebted to said Bank for more than five thousand dollars, and complainants were demanding payment or security for same, and thereupon said Ella E. Vandolah executed a bill of sale of her interest in said firm as security for said notes; that said Charles P. Scrogin on and prior to said date was also indebted to said Bank for more than five thousand dollars; that complainants were demanding payment or security for the same, and that thereupon said Charles P. Scrogin delivered to said Bank a note of Daisy F. Scrogin for five thousand dollars, together with a bill of sale for his interest in said Company in satisfaction of said indebtedness; that after the execution and delivery of said bills of sale complainants informed Emily S. Vandolah that they held such bills of sale and agreed with her that the business of the firm might be continued until further arrangements; that prior to the execution and delivery of said bills of sale the business of said firm was in charge of

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James W. Vandolah as manager, that when said bills of sale were executed and delivered, complainants and said Emily S. Vandolah agreed to retain James W. Vandolah as manager; and he then agreed to act in such capacity and to furnish them monthly statements, etc.; that on August 3, 1910, Emily S. Vandolah died, leaving a last will and testament which was duly admitted to probate, and B. A. Franklin was appointed and qualified as administrator with the will annexed and is acting as such; that since the death of said Emily S. Vandolah said James W. Vandolah has continued to manage said business and that no steps have been taken to settle said partnership; that on December 22, 1910, the sheriff made a levy of certain executions then in his hands in favor of certain judgment creditors of Charles P. Scrogin upon a supposed undivided interest of said Charles P. Scrogin in the property of said Company, and now claims said executions are a lien upon the former interest of said Charles P. Scrogin in said firm, and claims to have taken possession of all the property of said firm and is about to sell the same; that said execution creditors were fully advised before the executions were delivered to the sheriff of complainant's rights under said bill of sale; that said Ella E. Vandolah is claiming that said bill of sale executed by her is of no force and effect; that the rights of complainants under said bill of sale from Charles P. Scrogin took precedence over said executions; that by reason of the death of Emily S. Vandolah the firm was dissolved by operation of law, wherefore complainants are entitled to the winding up of the business of said Lexington Electric Light Company and to have its assets turned into cash and distributed among the parties entitled thereto.

All the persons interested were made parties defendant except said Charles P. Scrogin. A temporary injunction was issued restraining the sheriff

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from making any sale of said property. All the defendants joined in the same answer. The answer admits the partnership as alleged and that James W. Vandolah was indebted to the Bank in the sum of five thousand dollars on said date; but states said indebtedness has since been paid; avers that said bill of sale executed by said Ella E. Vandolah was made in consideration that said indebtedness of said James W. Vandolah would be turned over to her and the notes representing the same delivered to her, and said Bank did not turn over or deliver up said notes to her and refused to do so; denies that Charles P. Scrogin gave to said Bank a note of Daisy F. Scrogin for the sum of five thousand dollars together with said bill of sale, in satisfaction of his indebtedness to said Bank; denies that complainants informed Emily S. Vandolah that they held such bills of sale and that they agreed with her that the business might be continued until further arrangements were made; denies that said Emily S. Vandolah agreed with complainants to retain James W. Vandolah as manager of said business; denies that said judgment creditors had knowledge of complainants' rights under the aforesaid bill of sale; denies complainants took possession of said interest of said Charles P. Scrogin in said Electric Light Company; admits said Ella E. Vandolah is claiming that said bill of sale executed by her is without force.

The cause was referred to a special master, who found that by virtue of the bill of sale from Charles P. Scrogin to the Bank the latter obtained a prior lien over the judgment creditors on the interest of said Scrogin in said partnership business. He also found that James W. Vandolah, husband of Ella E. Vandolah, owed the Bank on February 16, 1910, five thousand dollars, evidenced by a promissory note; that an arrangement was entered into between said

Bank and said Ella E. Vandolah, through said James W. Vandolah as her agent, under which said Bank agreed to deliver said note to said Ella E. Vandolah in satisfaction of her turning over to it by said bill of sale her interest in said partnership; that she executed such bill of sale and delivered it to the Bank, but that the Bank never delivered to her the note in question, and therefore the consideration in the bill of sale of Ella E. Vandolah wholly failed. These findings were approved by the chancellor, and a decree entered appointing a receiver and ordering the property of the partnership to be sold, and after the payment of the debts should be divided equally between the said Bank of Lexington, B. A. Franklin, administrator of the estate of Emily S. Vandolah, and Ella E. Vandolah, and that the injunction prayed for against James Reeder, sheriff, should be made perpetual. The property sold for eight thousand dollars. Plaintiffs in error assign error to that part of the decree finding that the Bank took the interest of Charles P. Scrogin in the partnership business and in making the injunction perpetual against the sheriff and the judgment creditors. Defendants in error assign cross-errors to that part of the decree finding that there was no consideration for the bill of sale executed by Ella E. Vandolah and that the Bank did not acquire her interest in said partnership firm by virtue thereof.

It is the contention of plaintiffs in error that the bill of sale by Charles P. Scrogin attempted to convey the personal property without reducing the same to possession, and of which the judgment creditors had no notice and was therefore void as to them, and it appears to be the contention of defendants in error that said bill of sale conveyed an absolute one-third interest *in rem* in said partnership property. Neither of these contentions is correct. The principles of law involved in this controversy are so well established

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that an extended discussion of the same is unnecessary. Neither of these bills of sale are made to the Bank as grantee, they are each made to "A. J. Scrogin, President of Home State Bank." The words "President of Home State Bank" are simply *descriptio personal* but as the answers admit that said bills of sale were in fact made to said Bank and as on the hearing in the court below and in this court the parties have proceeded on that theory, this court will adopt that construction which the parties themselves have assumed.

The interest that partners have in a partnership property is not that of tenants in common, nor of joint tenancy, but is *sui generis* and peculiar to itself. Each partner has a joint interest in the whole, but not a separate interest in any particular part of the property. A partner cannot transfer an undivided interest in any specific article belonging to the firm. A partner may assign his interest in a partnership to a third person, but such person does not thereby, without the consent of the other partners, become a partner in the firm. Such a transfer of a partner's interest, either by voluntary act or legal process, simply entitles such person to receive such partner's share of what may remain after a settlement of the partnership affairs and the payment of all partnership debts. He takes nothing but a chose in action and the right to an accounting. He simply becomes subrogated to the rights of said partner in the winding up and settlement of the partnership estate. *Morrison v. Austin State Bank*, 213 Ill. 472; *Sindelare v. Walker*, 137 Ill. 43; *Trowbridge v. Cross*, 117 Ill. 109; *Tafe v. Schwamb*, 80 Ill. 289; *Carter v. Bradley*, 58 Ill. 101. The possession of partnership property by one partner is the possession for all. *Brown v. Graham*, 24 Ill. 628. A bill of sale of a partner's interest in a partnership being but a chose in action, possession of the property is presumed to have been delivered

by the delivery of said bill of sale. *Rice v. Gilbert*, 173 Ill. 348. Under both the law and the facts in this case the bill of sale of said Scrogin was merely an assignment of his interest as a partner in said partnership to the Bank as collateral security for the payment of his notes and was a pledge of his interest in the partnership for that purpose, and while in this particular case the ultimate result, so far as the beneficial interests of the parties to this controversy are concerned, might not be effected by holding this transaction to be a pledge as collateral security rather than an actual sale of his interest in the partnership property, yet such was its end and effect. This bill of sale was taken by the Bank and placed with the notes evidencing the indebtedness. These evidences of indebtedness were not delivered or surrendered to the grantor, but were retained and have been retained by the Bank, and the bill makes no offer to surrender and cancel them. Moreover, the laws of this State did not permit State banks to buy interests in partnership firms and become partners thereof, nor to indulge in the commercial business of an electric light company.

But this bill of sale being a pledge of said Scrogin's interest in said partnership firm as collateral security for his indebtedness, and having been executed for a valuable consideration and prior to the entry of the judgments in question, the Bank obtained a lien on said partnership interest paramount to the rights of the other creditors, whether they had notice of such pledge or not. *Cooper v. Ray*, 47 Ill. 53; 22 A. & E. Encyc. Law, 867. If the value of the partnership property had been more than sufficient to have satisfied Scrogin's indebtedness out of his share, then the balance would have been subject to the claims of his other creditors and the decree would have been erroneous, as it finds that the Bank was entitled to the whole of Scrogin's distributive share on the the-

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ory that there was an absolute sale of his interest to the Bank, but as the partnership property sold for only eight thousand dollars, it is manifest that one-third of this would not satisfy his indebtedness to the Bank. Therefore no harm is done to the judgment creditors by the decree in this respect.

As to the bill of sale executed by Ella E. Vandolah to the Bank, the special master found, and the court approved his finding, that the consideration therefor failed and the Bank took no interest in the partnership property by virtue thereof. There was evidence tending to support this finding, and as it is not manifestly against the weight of the evidence, we are not disposed to disturb it.

The decree of the Circuit Court, therefore, is substantially correct and will be affirmed.

Affirmed.

Bernard Gause (Abendroth & Root Manufacturing Company, Defendant in Error), v. Venango Construction Company et al., Plaintiffs in Error.

1. **MECHANICS' LIENS, § 57***—*when owner liable to party furnishing materials as an original contractor.* Where persons organized a water company and pursuant to a scheme to build a large water works system, without capital, let the contract to a construction company formed by one of their number, and the construction company was simply used as a receptacle in which to place all the indebtedness incurred in the construction of the plant so that the creditors of such construction company would have no recourse and the profits on the deal would be equally divided between the promoters of the scheme, *held* under the circumstances that the water company was liable to a party that had furnished materials to the construction company as an original contractor instead of a subcontractor.

2. **MECHANICS' LIENS, § 128***—*when contractor's lien prior to subsequently recorded trust deed.* An original contractor's lien attaches

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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from the date of the contract and takes priority over a trust deed recorded subsequent to the execution of the contract.

Error to the Circuit Court of Morgan county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914. Rehearing denied June 25, 1914.

WORTHINGTON, REEVE & GREEN and KIRBY, WILSON & BALDWIN for plaintiffs in error.

BELLATTI, BARNES & BELLATTI, for defendant in error.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

The original bill in this case was filed by Bernard Gause against the plaintiffs in error and also Abendroth & Root Manufacturing Company and Builders' Iron Foundry Company to enforce a mechanic's lien on the property of the Jacksonville Water Works Company. The claim of Gause was settled and is not involved. The Abendroth & Root Manufacturing Company filed its cross-bill against all the above mentioned parties to enforce a mechanic's lien against said property, and a decree was entered in its favor on said cross-bill. The only errors assigned are such as relate to that part of the decree foreclosing the lien of the defendant in error, the Abendroth & Root Manufacturing Company.

In 1904 Omar N. Gardner, a civil engineer, Charles W. Mackey, an attorney at law, and Orrin D. Bleakley, president of the Franklin Trust Company of Franklin, Pa., originated a scheme for constructing a water works for the city of Jacksonville, Illinois. Gardner and Mackey procured a franchise from the city of Jacksonville granting them the privilege of supplying the city with water. The ordinance granting the franchise was passed in September of that year and authorized them to assign it to a corpora-

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tion to be organized by them and required that the water should be brought from the river bottom about eighteen miles away. They caused to be organized the Jacksonville Water Works Company, to which they assigned said franchise, with a capital stock of \$350,000. Of this capital stock Mackey subscribed for 3,494 shares, the par value of each share being \$100. Mackey was elected president and was also a member of the executive committee, Gardner became a director, and Bleakley became a director, treasurer and member of the executive committee. The directors passed a resolution authorizing Mackey, the president, to enter into a contract with Gardner to construct the water works. Thereupon Gardner resigned as director, but instead of entering into a contract with Gardner for the construction of the works, the Venango Construction Company was organized under the laws of Pennsylvania with a capital stock of \$50,000, of which Gardner was made president, and he subscribed for substantially all of the stock of that Company, and the contract for the construction of the works was let by the Water Company to this Construction Company. No part of the capital stock of either the Water Company or the Construction Company was ever paid. After the meeting of the stockholders of the Water Company at which they elected the directors, which was in January, 1905, there never was another meeting of the stockholders for over two years. After the first preliminary meeting of the directors of said Company there never was another meeting of the directors for a like period of time. The stockholders of the Construction Company met and elected directors and never met again. The directors met and elected Gardner president and never met again. All the future transactions involved in this litigation so far as the Water Company, the Construction Company and the Trust Company are concerned were carried on by the three individuals, Gard-

ner, Mackey and Bleakley. The contract between the Construction Company and the Water Company provided that the Construction Company should obtain the land and right of way, furnish all materials and construct the wells, pumping station and pipe line, and that when the plant should be completed it should turn the same over to the Water Company complete and ready for use, and the Water Company agreed in consideration thereof to turn over to the Construction Company bonds to the amount of \$350,000, which it had authorized to be issued, and all its capital stock with the exception of ten shares. Thereafter the Trust Company, by O. D. Bleakley, its president, entered into an agreement with the Construction Company by which the Trust Company agreed to loan the Construction Company \$280,000, and received as security the Water Company's bonds to the amount of \$350,000, and to secure the payment of the bonds a trust deed was executed by the Water Company to the Trust Company as trustee and conveyed to the latter all property it then had, and all that it might afterwards acquire. At this time the Water Company owned no real estate. This trust deed was executed immediately upon the organization of the Water Company and was dated January 4, 1905, but was not recorded until January 28, 1905. On this same day, January 4, 1905, an agreement was entered into between the Construction Company, the Trust Company and certain underwriters, among whom were Mackey and Bleakley, which agreement referred to the organization of the Water Company and the Construction Company and recited that the Construction Company had entered into such contract with the Water Company and that the Water Company had issued its bonds for \$350,000, and its stock to the amount of \$350,000, and had delivered the bonds and stock to the Construction Company in full consideration of the work to be done under the contract between the two

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companies, and the underwriters agreed to underwrite the bonds. The bonds were underwritten at the rate of \$800 per bond, the par value of each bond being \$1,000. Shortly thereafter Mackey, Bleakley and Gardner personally entered into a written agreement to divide all the profits on the whole deal equally between them. Bleakley was then substituted as trustee in the trust deed in place of the Franklin Trust Company. In January, 1905, prior to the recording of the trust deed in question, the Construction Company entered into a contract with the defendant in error, the Abendroth & Root Manufacturing Company, whereby the latter was to furnish steel pipe and forcing mains to be used in the construction of the plant and through which the water should be carried from the wells to the city, about eighteen miles away, for the agreed price of \$1.50 per lineal foot. Other contracts were made with other persons and companies for other material and construction work and all the contracts were prepared by Mackey. The Manufacturing Company furnished the pipe and there was a balance due it of \$22,445.36. The Construction Company proceeded to construct the plant and obtain the right of way and ten acres of land on which the pumping station was erected, but instead of taking the title to the land in its own name, as its contract with the Water Company contemplated, had the deed executed conveying it directly to the Water Company. Before the Manufacturing Company entered into the contract to furnish the pipe to the Construction Company, the latter had furnished it with a copy of this contract with the Water Company, which provided that the Construction Company should obtain the necessary land and right of way and on the completion of the work should convey it to the Water Company. The Construction Company defaulted in its payments under its various contracts for the material and construction of the works, and it having no assets of any kind whatever and the deeds to all the property on which the improvements had

been made having been taken in the name of the Water Works Company, the various creditors, among which is the Manufacturing Company, filed bills or cross-bills to foreclose mechanics' liens upon the property of the Water Company, on the theory that the Water Company and the Construction Company were substantially one and the same thing and that the Construction Company was simply used as a scheme by which the creditors who furnished the labor and material for the construction of the water works might be defrauded out of the just payment of their claims. The chancellor who heard the case found that the Construction Company and the Water Company had equal interests in the property, and decreed a foreclosure of the liens.

It is the contention of plaintiffs in error that the Manufacturing Company was a subcontractor of the Water Company, and that as it had served no notice on the Water Company as required by the statute it cannot enforce a lien, and also that the trust deed is a prior lien and takes precedence over that of the Manufacturing Company. The evidence clearly shows that Mackey, Gardner and Bleakley attempted to promote a scheme to build a large and expensive water works system without capital and that the Construction Company was used simply as a receptacle in which to place all the indebtedness incurred by the construction, and that by taking the deeds to the property directly in the name of the Water Company the latter Company would be freed from all obligations except its bond issue, and the creditors would be left without recourse, and that the profits on the deal would be divided equally between them. Under such circumstances the Water Company is liable to the Manufacturing Company as an original contractor, and the contention that the latter is a subcontractor cannot be sustained.

The lien of the Manufacturing Company attached from the date of its contract with the Construction

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Company. This contract was executed before the trust deed was recorded and it therefore takes precedence over the trust deed.

The other contentions of plaintiffs in error we consider to be without merit, and the decree will be affirmed.

Affirmed.

Etta Boyd, Appellant, v. Rufus D. Boyd, Appellee.

1. HUSBAND AND WIFE, § 213*—*when separation agreement becomes abrogated by resumption of marital relation.* A separation agreement between husband and wife, whereby the wife in consideration of a certain sum released her husband from any claim or right to maintenance or support, becomes abrogated and void in so far as it attempts to relieve the husband of the maintenance and support of wife and child where the parties thereafter fully resume the marital relation.

2. HUSBAND AND WIFE, § 211*—*what postnuptial contracts not favored by law.* Postnuptial contracts between husband and wife made in contemplation of the parties living separate and apart, or where the element of separation enters into them, or where the separation is an accomplished fact when the contract is made, and without it in all probability the contract would not have been made, are not looked upon with indulgence by the law.

3. CONTRACTS, § 142*—*validity of postnuptial contracts.* Postnuptial contracts between husband and wife adjusting their interest in the property of each other, not made in contemplation of living separate and apart, are not contrary to public policy and are valid when understandingly and voluntarily entered into.

Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 5, 1914.

FRED HAMILTON and WHITLEY & FITZGERALD, for appellant.

REDMON & HOGAN, for appellee.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Appellant filed her bill in the Circuit Court of Macon county against her husband, appellee, for separate maintenance. The bill alleges that appellant and appellee were married on the seventh day of March, 1903; one child, Lawrence Andrew Boyd, now about four years old, was born of said marriage; that appellee abandoned her without fault on her part about January 25, A. D. 1913; that appellee was guilty of many abuses to her so that her life was rendered miserable and unendurable, which conduct on his part continued until about the fifth day of January, 1911, at which time on account of his said conduct towards her she was compelled to leave him and remained away until about May 4, 1912, at which time he agreed and promised to refrain from all misconduct, and she, relying upon said promises, agreed to and did live and cohabit with him again as his wife; that after she had returned and resumed her marital relations with him he continued his acts of misconduct and abuse towards her and on the twenty-third day of January, A. D. 1913, sold all his personal property and on the twenty-fifth day of January he abandoned appellant and their child without cause. A temporary injunction was issued restraining appellee from removing, incumbering or disposing of his moneys and personal property. Subsequently an amendment to the bill was filed alleging that on the fifth day of January, 1911, appellant, at the instance and request of appellee, signed a certain agreement in writing which recites that in consideration of the sum of \$1,020, appellant released appellee from any claim or right to maintenance and support which existed between them on account of the marriage relations; that appellant about the fourth day of May, 1912, returned from the State of Tennessee, where certain property she had purchased with said sum of money is situated, and

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by agreement between herself and appellee they resumed their marital relations and continued to reside and cohabit with each other as husband and wife until the twenty-fifth day of January, A. D. 1913; that in consequence thereof the said agreement became null and void; that said agreement was to last only for a space of two years and that she stands ready and willing to deed back the land to appellee if, upon the hearing, that should seem just and equitable to the court; that she has no means but her own labor for her support and maintenance and has never received but \$41.50 rent from said land in question. Answers were filed to the bill and the amended bill denying generally all allegations in regard to the misconduct of appellee, admitting that after said contract was made the parties resumed their marital relations, but denying that by reason thereof said contract became void.

When the cause came on for hearing and after the opening statements of counsel had been made, the court asked to have the contract produced, which was done. The court then decided that the contract was a complete bar to the relief prayed for in the amended bill, and over the objection of appellant refused to hear any evidence in support thereof, and dismissed the bill for want of equity. It was stipulated in open court that the parties to the contract had resumed marital relations after the contract had been executed as set forth in the amendment to the bill.

The only questions to be determined on this appeal are: First, did the resumption of the marital relations between the parties after said contract was executed render the contract void, or at least so much of it as released appellee from the maintenance and support of appellant and the child? Second, was the court warranted in dismissing the bill for want of equity without hearing any evidence offered in support thereof?

The bill and the amendment thereto are very inartificially drawn. The contract in question is not set out *in haec verba*, nor is the substance of the whole contract alleged, nor is it attached to or made a part of the amendment, and while the certificate of evidence shows that a contract was produced and examined by the court, it does not appear that it was introduced in evidence. But we think the bill as amended is sufficient to present the propositions above mentioned for determination.

Appellee contends that by virtue of chapter 68 of the Revised Statutes (J. & A. ¶ 6143), a wife has the right to contract with her husband in respect to all matters, including her property rights, and that all restrictions upon the power of husband and wife to contract with each other, excepting in so far as they are expressly retained by the statute, are removed; that the contract in question in this case was valid and was not abrogated or annulled by the resumption of the marital relations between the parties.

While it is unquestionably true that the statute has removed most of the restrictions upon the power of married women to make contracts, yet contracts, whether made by married women or other persons, are subservient to the doctrine of public policy of the State in which they are made. The public is interested in the adjustment of all questions growing out of marital relations involving divorce and separation. "The dissolution of the marriage tie is a subject in which not alone the parties to it are interested, but the public is interested also." *Trenchard v. Trenchard*, 245 Ill. 313. To the same effect, *Wilson v. Cook*, 256 Ill. 460.

Postnuptial contracts between husband and wife adjusting their interests in the property of each other, not made in contemplation of living separate and apart, when understandingly and voluntarily entered into are not contrary to public policy and are valid.

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But such contracts made in contemplation of the parties living separate and apart from each other, or where the element of separation enters into them, or where the separation is an accomplished fact when the contract is made, and without it in all probability the contract would not have been made, are not looked upon with indulgence by the law, and while in some cases they will be enforced while the parties live in separation, yet in our opinion when the parties effect a reconciliation and resume their marital relations fully and completely, such contract is abrogated by the action of the parties themselves and ceases to have any force or effect, at least in so far as it attempts to relieve the husband from the maintenance and support of his wife and children. While this question does not seem to have been passed upon by the Supreme Court of this State, the proposition above announced has been approved in similar or analogous cases in other jurisdictions. *Shelthar v. Gregory*, 2 Wend. (N. Y.) 422; *Carson v. Murray*, 3 Paige (N. Y.) 483; *Zimmer v. Settle*, 124 N. Y. 37; *Wells v. Stout*, 9 Cal. 479; *Smith v. King*, 107 N. C. 273; *Archbell v. Archbell*, 158 N. C. 408; *Roberts v. Hardy*, 89 Mo. App. 86; *Gaster v. Gaster's Estate*, 90 Neb. 529; *Knapp v. Knapp*, 95 Mich. 474.

In 1 Bishop on Marriage, Divorce and Separation, sec. 1312, it is said: "Marriage is a public institution as well as private; the public is in effect a party to every marriage and to every divorce; and two persons who have united in matrimony cannot by their mutual consenting create a separation even from bed and board, for this is an act requiring also the sanction of the third party, the public. In circumstances pointed out by the laws, the courts will give this sanction in the form of a judicial decree. So that bargainings for a separation, made simply between the married parties, whether with or without the intervention of a trustee, are nugatory." And the same

author in discussing such a contract as is here involved, in the same work, sec. 1283, states the rule to be: "A renewal of cohabitation commonly terminates the agreement, since the usual consideration for it has ceased to operate." In Tyler on Infancy and Coverture, sec. 343, it is stated: "Reconciliation and recohabitation will avoid a deed of separation." The same doctrine is also announced in Tiffany on Persons and Domestic Relations, page 168.

The law does not favor the living apart of husband and wife, and under all circumstances encourages reconciliation. This principle is based upon sound public policy. Story in his work on Equity Jurisprudence, sec. 1427, states it as follows: "So earnest, indeed, are courts of equity to promote the reconciliation of parties living in a state of separation that they will on no occasion whatsoever enforce articles of separation by decreeing a continuance of the separation." And again in section 1428: "In the next place, even in cases of a deed for an immediate separation, if the parties come together again there is an end to it with respect to any future, as well as to the past separation."

Counsel for appellee cites the case of *Stokes v. Stokes*, 240 Ill. 330, as holding contrary to the doctrine we have herein approved. We do not so construe the decision in that case. In that case it appeared that there was an antenuptial contract made between the parties in which the rights of the wife were fixed in the property of the husband; that afterwards the husband and wife separated and the husband being old and feeble-minded a conservator was appointed for him, and that the wife and the conservator executed a subsequent contract, or postnuptial contract, which, while made when the parties were living apart, yet was made for the purpose of substituting that contract for the antenuptial contract. While the facts in that case show that during the last

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illness of the husband he lived with the wife, yet at that time he was feeble-minded, and the conservator paid the wife a certain amount per week to nurse him and take care of him until he died, and there was no evidence to show that any actual marital relations were resumed between the parties, in fact there could not have been under said circumstances. There is nothing in the opinion in that case expressing any views contrary to those held herein.

We are of opinion, therefore, that if the marital relations were fully resumed between the parties in this suit after said contract was made, such action of the parties themselves abrogated said agreement and it became null and void in so far, at least, as it attempts to relieve the husband of the maintenance and support of his wife and child. Whether such marital relations were resumed was a question of fact to be determined from the evidence upon the hearing, and it follows that the Circuit Court erred in refusing to hear any testimony and in dismissing the bill for want of equity.

The decree will be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

**Henry Marriage, Appellee, v. Electric Coal Company,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914. Rehearing denied June 25, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Henry Marriage against Electric Coal Company, a corporation, to recover for personal injuries received by plaintiff while working in defendant's mines. A verdict was rendered finding defendant guilty and assessing plaintiff's damages at \$3,545. To reverse a judgment entered on the verdict, defendant appeals.

The declaration consists of four counts. The first, third and fourth charge defendant with common-law negligence. The second count is predicated upon the wilful violation of section 21, paragraph "a" of the Mines and Miners' Act of 1907 (corresponding section of Act of 1911, J. & A. ¶ 7489), which was in force at the time of the injury. The second count, in substance, charges that on February 4, 1911, the defendant was operating the coal mine in question and plaintiff was in the employ of defendant as a coal digger; that in the performance of his duties it was necessary for him in going to and from his work to pass through the second southeast main entry in said mine, which was used as a single track haulage road on which the trains of pit cars were moved by machinery; that plaintiff and others traveled on foot to and from their work through said entry; that defendant wilfully failed to cut in the said walls of said haulage road places of refuge not less than three feet in depth, four feet wide and five feet high and not more than twenty yards apart, or to provide a clear place of at least three feet between the sides of the cars traveling on said haulage road and the side of the road; that while traveling on foot to his work in said entry a train of cars, or trip, struck him by reason of defendant's wilful failure to comply with the statute and plaintiff was unable to escape from said cars or trip and was crushed between the same and the side of the entry and had his hip broken and was otherwise permanently injured. The defendant filed the plea of general issue to all the counts.

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It is conceded that at the time of the accident no places of refuge were constructed and maintained in this haulage way as required by section 21 of the statute, and that there was not a clear space of three feet wide on either side of the entry between the sides of the cars and the entry, but it is contended that the failure to provide said place of refuge was not the proximate cause of the injury.

CHARLES TROUP, for appellant; MASTIN & SHERLOCK, of counsel.

THOMAS A. GRAHAM, for appellee; CHARLES W. FLEMING, of counsel.

MR. JUSTICE ELDBEDGE delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1526*—*when giving of erroneous instruction harmless error.* The giving of an erroneous instruction in relation to one count in the declaration, *held* harmless where the verdict may be sustained under a different count.

2. APPEAL AND ERROR, § 1734*—*when errors not assigned on first appeal cannot be urged on second appeal.* Alleged errors in instructions cannot be urged where the same instructions were given but were not assigned for error on a prior appeal.

3. MINES AND MINERALS, § 106*—*when rule of mine abandoned.* Evidence *held* to show that a posted rule of the mining company prohibiting employees to travel on a haulage road of the mine had abandoned and was not in force at the time of an injury to an employee, where it was the habit of the employees to walk to and from work through the haulage way and the company itself had abandoned the rule.

4. MINES AND MINERALS, § 181*—*when question whether violation of Miners Act was proximate cause of injury is for jury.* In an action by a miner to recover for personal injuries alleged to have resulted from a wilful failure of defendant to provide places of refuge in compliance with paragraph "a" of section 21 of the

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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Mines and Miners' Act of 1907 (corresponding section of Act of 1911, J. & A. ¶ 7489), *held* under the facts of the case that the question whether the violation of the statute was the proximate cause of the injury was a question for the jury.

**Lawrence D. Benedict, Appellant, v. John H. Holmes
et al., Appellees.**

(Not to be reported in full.)

Appeal from the Circuit Court of Macoupin county; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914.

Statement of the Case.

Action by Lawrence D. Benedict against John H. Holmes and C. J. Keiser upon the following written instrument:

“In consideration of the purchase price paid to us for the timber described in attached bill of sale, said timber standing on Sections 2, 3, 10 and 11, Township 31 North, of Range 9 West, we hereby agree to indemnify L. D. Benedict, his heirs or assigns, against any loss or damage which may be caused him by reason of the existence of any mortgage or incumbrance on the above described premises.

(Signed) C. J. KEISER,
J. H. HOLMES.”

Defendants sold by bill of sale to plaintiff the timber standing upon about three hundred acres of land for the purchase price of \$2,250. These lands, together with others, were incumbered with mortgages. After the bill of sale was executed and delivered, the agreement above set out was executed. Plaintiff began to remove timber from the land and cut timber therefrom for nearly a year, when a bill was filed to foreclose the mortgage and plaintiff was enjoined from

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removing any timber from the premises. Plaintiff procured a modification of the injunction to the extent of permitting him to remove from the premises the timber remaining thereon which had been cut. The case was tried before the court, without a jury, who found the issues in favor of plaintiff and assessed his damages at \$2,522.70. This amount includes the original purchase price together with interest thereon, the attorney's fees and expenses paid by plaintiff in procuring the modification of the injunction in the foreclosure suit.

Plaintiff not being satisfied with the amount of the judgment, appeals.

RINAKER & RINAKER, for appellant.

L. M. HARLAN, L. S. HARVEY and PEEBLES & PEEBLES, for appellees.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. INDEMNITY, § 3*—*when agreement without consideration.* A written agreement by vendors reciting that in consideration of the purchase price paid to us for standing timber "described in attached bill of sale, * * *" we agree to indemnify the purchaser against loss or damage which may be caused him by reason of the existence of any incumbrance on the premises, *held* to be without sufficient consideration since the only consideration for the agreement was the executed bill of sale.

2. APPEAL AND ERROR, § 1078*—*necessity of assignment of cross-errors.* On appeal from a judgment allowing a recovery on an indemnity contract which has no sufficient consideration to support it, the Appellate Court must affirm the judgment where no cross-errors are assigned.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mary Brown, Administratrix, Appellant, v. City of Decatur, Appellee.

1. WORKMEN'S COMPENSATION ACT, § 3*—*when city engaged in maintenance of water plant is employer within the Compensation Act.* A city engaged in the maintenance of water mains in connection with its water works plant, *held* to be an employer engaged in maintaining a structure within the meaning of section 2 of the Workmen's Compensation Act of 1911, J. & A. ¶ 5450, which provides that the act shall apply to an employer "engaged in building, maintaining or demolishing of any structure."

2. WORKMEN'S COMPENSATION ACT, § 1*—*word "structure" in Compensation Act construed.* The word "structure" in section 2 of the Workmen's Compensation Act of 1911, J. & A. ¶ 5450, means anything that is built or constructed.

3. WORKMEN'S COMPENSATION ACT, § 11*—*when workman is killed while performing act incidental to his employment.* Where a workman for a city water works department was ordered to bring his rubber boots and assist other employees in fixing a leak in the water mains located at a place between railroad tracks, and after his arrival when he was attempting to go to a hand car standing on the tracks, for the purpose of sitting on it to take off his shoes and put on the boots, he was struck by a train and killed, *held* that the deceased at the time of the injury was in the performance of an act incidental to his employment, and that the risk which caused his death was also incidental to his employment within the meaning of section 1 of the Workmen's Compensation Act of 1911, J. & A. ¶ 5449.

Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded with directions. Opinion filed May 5, 1914.

LE FORGEE, VAIL & MILLER, for appellant.

BALDWIN & CAREY and FRANK M. COX, for appellee.

MR. JUSTICE ELDBEDGE delivered the opinion of the court.

*See Cumulative Quarterly, same topic and section number.

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This is an appeal from a judgment of the Circuit Court of Macon county on an appeal in that court from an award of arbitrators appointed under the provisions of the Act of June 10, 1911, commonly called the Illinois Workmen's Compensation Act. (J. & A. ¶¶ 5449 *et seq.*) The arbitrators awarded appellant compensation in the sum of \$2,496. On an appeal from said award to the Circuit Court on a trial *de novo* the judgment of the court reversed the award of the arbitrators and dismissed appellant's claim.

Appellant's intestate was killed October 19, 1912, and subsequently appellant presented her petition to the County Court, as provided by said act, asking the court to appoint an arbitrator to act with the arbitrators appointed by herself and by her intestate's employer. The court appointed an arbitrator and the three arbitrators proceeded to hear the matters in dispute and filed its report with the Secretary of the State Bureau of Labor Statistics, which report awarded to appellant the said sum as the amount of compensation to be paid to her under said act for the death of her intestate. Both appellant's intestate and appellee had accepted the provisions of the act in so far as they applied to the employment. It is admitted that the amount of compensation awarded by the arbitrators is correct, if compensation is recoverable at all. There is no apparent conflict as to the facts, but the principal contentions of appellee are that the employment of the deceased was not one of the employments covered by the act and that his death was not caused by the sort of injury for which the act allows compensation, that is, that it did not arise out of his employment. It is also suggested that appellee was not an employer maintaining a structure within the meaning of the act.

Appellee is a municipal corporation and operates its own filtration plant and water system, and as a part of this system operated and maintained a system of water mains for the supplying of water to the city.

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One of these water mains ran beneath the surface of a public highway lying a short distance east of the eastern boundary of the city, called Gedde's Lane. Gedde's Lane runs north and south across the right of way of the Wabash Railroad Company. The tracks of the railroad consist of two main line tracks and a number of switch tracks lying on either side of the main tracks. Plaintiff's intestate, Brown, on the day in question was, and had been for about a year prior thereto, an employee in the City Water Works Department. A leak had been discovered in the water main at the Gedde's Lane crossing and had been located at a point between the south main track and the next switch track south of it. A. O. Cochran, foreman and employee of the water department, had charge of the work of repairing this leak. Cochran ordered Brown and one Walmsley, another employee, to go out to the crossing and repair the leak. Cochran himself and Walmsley arrived at the crossing about half past one in the afternoon and Cochran set Walmsley to work immediately. Walmsley, at Cochran's request, had brought with him a pair of rubber boots to wear while repairing the leak. A hand car was standing a short distance, about ten steps, from the leak on one of the switch tracks. When Cochran and Walmsley arrived at the place Walmsley sat down on the hand car, took off his shoes and coat and put on the rubber boots. He left his shoes and coat on the hand car. Walmsley immediately began to dig out the dirt and mud around the leak, while Cochran kept watch for approaching trains. Brown had been doing some other work that day and before Cochran and Walmsley went out to repair the leak Cochran telephoned to Brown to come out there and assist Walmsley. Cochran told Brown to bring his rubber boots with him "so that he could use them if it was muddy and he needed them to get into the hole." Brown arrived about two o'clock and brought some caulking tools in a bucket and a pair of

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rubber boots. He deposited the bucket with the caulking tools by the hole and Cochran gave him his instructions, which were that one man should watch for the trains while the other worked. Cochran did not intend to stay after Brown arrived, and testified that he gave these instructions to Brown and Walmsley because he recognized the danger of working there between the tracks on which the trains were constantly passing. After Brown received his instructions from Cochran he proceeded towards the hand car for the purpose of sitting on it while he took off his shoes and put on his rubber boots. It was the only place on which he could sit unless he sat on the ground. He had proceeded but a short distance towards the hand car, carrying his rubber boots, when he was struck by an engine hauling a passenger train, and killed. There is no conflict over the material facts. The trial court found as a proposition of fact that it was an inference of fact that Brown in attempting to cross the railroad tracks was doing so for the purpose of going to the hand car in order to remove his shoes and put on his rubber boots for the purpose of his work. The trial was had before the court without a jury and as no cross-error has been assigned to this finding of fact it must be conceded to be true. However, the evidence fully sustains this inference of fact and it is correct. The trial court held that appellee was an employer engaged in maintaining a structure and that the injury was received in the course of the employment of deceased, but that it did not arise out of said employment, and that appellee was not liable to pay compensation, and dismissed the petition.

Section 2 of the act (J. & A. ¶ 5450) provides as follows: "The provisions of this Act shall apply to every employer in the State engaged in the building, maintaining or demolishing of any structure." Municipalities are not excepted from the provisions of the act, and it is clear that appellee, the City of Decatur,

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is an employer within the intention of the act, provided it was engaged in the building, maintaining or demolishing of any structure.

It would require a most strained and unreasonable construction to hold that the maintenance of water mains in connection with a water works plant would not be the maintaining of a structure. The word "structure" commonly means anything that is built or constructed, and that it was the intention of the Legislature that such should be its definition in the construction of this act there can be no doubt.

It is conceded that the injury occurred in the course of the employment of plaintiff's intestate, but it is insisted by appellee that it did not arise out of said employment. The Illinois Act is substantially adopted from the English Acts of 1897 and 1906 (Stat. 60, 61, Vict. ch. 37; Stat. 6 Edw. 7, ch. 57), and it will be presumed that the construction given to them by the English courts is to be applied to the Illinois Act unless such construction is inconsistent with the spirit and policy of the laws of this State. Section 1 of the Illinois Act (J. & A. ¶ 5449) provides as follows:

"Any employer covered by the provisions of this Act in this State may elect to provide and pay compensation for injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this act, and thereby relieve himself from any liability, for the recovery of damages, except as herein provided."

Section 1, subsec. 1 of the English Acts provides as follows:

"If in any employment (to which this act applies) personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer * * * shall be liable to pay compensation."

The title of the Illinois Act is: "AN ACT to promote the general welfare of the people of this State, by providing compensation for accidental injuries or death

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suffered *in the course of employment.*'' The generic classification of the injuries for which an employer is liable under the act is those that are received in the course of the employment, but these are limited and restricted to such as also arise out of the employment. It is conceivable that in many instances it might be difficult to determine the distinction between injuries received in the course of employment and those that arise out of such employment. The injury received in this case was caused by an agency beyond the control of the employer.

The first question which naturally presents itself for consideration is, was the deceased at the time of the injury in the performance of an act incidental to his employment. He was proceeding to the hand car for the purpose of putting on his rubber boots. He had been directed by the foreman, Cochran, to bring his rubber boots with him. If it should be of any importance that he should have received an express order from his employer to wear said rubber boots, such order will be implied from the fact that he was directed to bring them with him. However, it was natural, proper and incidental to the work which he was to perform to wear rubber boots regardless of any order or direction from the employer. An employee can more efficiently perform his duties to his employer if attired in apparel inuring to his comfort and health while in the performance thereof. Walmsley, with the acquiescence of the foreman at least, had used the hand car for a similar purpose. Deceased saw Walmsley's shoes and coat on the hand car, which was about ten steps away, and as it was the only object on which he could sit while he put on his boots, unless he sat upon the ground between the tracks, he was not acting out of the sphere of his employment in attempting to go to the hand car for said purpose. The act he was doing at the time was incidental to and in the furtherance of his duties to his employer. Some of the English cases have given a

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very liberal construction to the question of what acts of employees are incidental to their employment. In the case of *Keenan v. Flemington Coal Co.*, 5 Fraser 164, 4 N. C. C. A. 122, a miner quit work temporarily to get a drink at a boiler. There were two ways of reaching the boiler, one a safe and usual way and the other a dangerous way. He chose the dangerous way and in returning was killed. Compensation was allowed and it was held that a man does not cease to be in the course of his employment every time he, for some necessary reason, leaves his work, and that it was a necessary reason for stopping work to get a drink of water, because when a man feels thirsty it hinders him from working with vigor. In the case of *Wilson v. M'. Laughlin*, etc., Sess. Cas. 529, a workman was employed to load and unload trucks hauled by a traction engine. While riding on one of them, and when under the influence of liquor, he dropped his pipe, and in getting down to pick it up he was run over. Compensation was allowed, and it was held that he was doing a thing which a man while working may reasonably do. "A workman of this sort may reasonably smoke, he may reasonably drop his pipe, and he may reasonably pick it up again," and it was held that his attempt to get the pipe was merely an incident in the day's work. It is urged that going to the hand car to put on his boots was a mere act of convenience for the personal benefit of the deceased. Counsel confuses the act itself with the manner of doing the act. The criterion is what was the deceased doing, and not what was the manner in which he was doing it. If he was attempting to perform an act incidental to the duties of his employment, it matters not that he took a more convenient way of doing it than was necessary, nor that he took a more dangerous way than was necessary. *Keenan v. Flemington Coal Co.*, *supra*; *Astley v. Evans*, v K. B., 1036, 3 N. C. C. A. 239; *Evans & Co. v. Astley*, A. C. 674, 3 N. C. C. A. 239. Compensation

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has also been allowed when the employee has been injured while performing his duties in a manner in direct disobedience to his orders. In *Harding v. Brynddu Colliery Co.*, 2 K. B. 747, 2 N. C. C. A., 864, 3 N. C. C. A. 276, a miner was directed to drill a hole from a stall above into a stall below to allow gas to escape. The stall below was boarded up as dangerous. He was unable to drill the hole from the upper stall and asked permission to go into the lower stall to tap in order to expedite the work. Permission was refused him, and he deliberately disobeyed, went into the dangerous stall and was injured. Compensation was allowed. In *Conway v. Pumpherston Oil Co.*, Sc. Sess. Cas. 660, 2 N. C. C. A. 865, 3 N. C. C. A. 276, a miner in direct disobedience to orders went into an entry filled with gas to get a pick which he had left there the previous day and was injured. Compensation was allowed and it was held that he was fetching a pick for the work in which he was engaged and was working within the general sphere of his employment. In *Whitehead v. Reader*, 2 K. B. 48, the injured employee was a carpenter, part of whose duty it was to sharpen tools at a grind stone operated by machinery. He had been forbidden to touch the machinery. The driving belt slipped and in trying to adjust it he received the injury complained of. Compensation was allowed and it was held that he was performing an act incidental to his master's business and was not idling or doing something which was clearly beyond the scope of his employment.

It is further contended that being struck by the engine while crossing the tracks was a risk shared by all mankind and was not such a hazard as was incidental to his employment. Risks incidental to the employment do not mean such as are peculiar to the employment in question as distinguished from other employments. In *Warner v. Couchman*, 1 K. B. 351, 1 N. C. C. A. 51, it was said: "The law does not say

‘arising out of his employment and out of that employment alone.’ Other employments have nothing whatever to do with the question.” If the risk was such that by reason of the work in which he was engaged, in the place where he was engaged and in the manner in which he was compelled to perform that work, he was more readily exposed to it than the public generally, then it was abnormal and incidental to his employment. That a person digging a trench in the midst of railroad tracks over which trains are constantly passing is more exposed to the risk of being injured by trains than the public generally in passing over railroad tracks is self-evident, and while the deceased was not injured while actually digging the trench he was on the tracks for that purpose and pursuant to the duties of his employment and was engaged in an act incidental to his employment. The English authorities have also given a liberal construction to this phase of the question. In the case of *Pierce v. Provident Clothing Co.*, 1 K. B. 997, 3 N. C. C. A. 279, a canvasser in a London district was killed on the streets by an electric car while riding a bicycle. He was permitted to ride a bicycle by his employer, but not required to do so. Compensation was allowed on the ground that his duties necessarily involved his spending a great part of the day in the streets, and he was, beyond all doubt, much more exposed to the risks of the streets than ordinary members of the public. Under a substantially similar state of facts, compensation was also allowed in the case of *M’Neice v. Singer Sew. Mach. Co.*, Sc. Sess. Cas. 12, 3 N. C. C. A. 278. To the same effect is *Millar v. Refuge Assurance Co., Ltd.*, Sc. Sess. Cas. 37, 3 N. C. C. A. 279. In *Challis v. London & S. W. Ry. Co.*, 2 K. B. 154, 3 N. C. C. A. 273, a locomotive engineer was injured by a stone thrown by a mischievous boy from a bridge below which the train was passing. Compensation was allowed on the ground that it was a matter of common knowledge and

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experience that a train in motion has great attraction for mischievous boys, and that it was a risk incidental to the employment. In *Anderson v. Balfour*, 2 Ir. Rep. 497, 3 N. C. C. A. 275, a gamekeeper was attacked by a poacher. Compensation was allowed on the ground that it was a matter of common knowledge that hospitality exists between gamekeepers and poachers and that one of the risks attached to the occupation of gamekeeper was the risk of this sort of injury. In *Nisbet v. Rayne & Burne*, 2 K. B. 689, 3 N. C. C. A. 268, a cashier was murdered on a train while carrying money to a colliery to pay the men. Compensation was allowed on the ground that the man was exposed to the special risks assumed by cashiers, who are known to carry considerable sums of money on regular days by the same route to the same place, of being robbed. In *Andrew v. Failsworth Industrial Society*, 2 K. B. 32, 3 N. C. C. A. 276, a bricklayer on a scaffold thirty feet above the ground was struck by lightning during a thunderstorm. Compensation was allowed on the ground that the position of the bricklayer was a very exposed one and on account of the elevation from the ground the risk was appreciably greater than the normal risk. In *Davies v. Gillespie*, 105 L. T. 494, the first officer of a vessel in a West Indian Port received a sun stroke while superintending the loading of a cargo. He was compelled to stand on the steel deck of the vessel for a long time exposed to the full glare of the sun, and compensation was allowed on the ground that it was an abnormal risk. In *Morgan v. Owners S. S. "Zenaida,"* 2 B. W. C. C. 19, a common seaman on a vessel in a Mexican port was ordered over the side to paint the ship. He protested on account of the excessive heat, but was ordered to continue. Compensation was allowed because the risk was abnormal.

We have not attempted to comment upon or differentiate between all the cases that have been cited in the briefs, but we are of the opinion that not only from

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the principles of construction enumerated from the cases mentioned, but from a plain, common-sense view of the act and the facts in this case, that at the time of the injury appellant's intestate was in the performance of an act incidental to the duties of his employment, and that the risk which caused his death was also incidental to his employment.

The judgment of the Circuit Court will therefore be reversed and the cause remanded with directions to enter judgment in favor of appellant on the award of the arbitrators as contained in said report.

Reversed and remanded with directions.

A. H. Cochran, Appellant, v. C. C. Bowersox, Appellee.

1. **BILLS AND NOTES, § 327***—*when defense of accommodation maker sufficient.* In an action on a promissory note where the defense was that the defendant had signed the note merely for the accommodation of a bank, which was the payee in the note, to enable it to cover up an indebtedness of another party, the real principal, so that the bank could pass an inspection by the bank examiner, that the bank promised not to negotiate the note, but in violation of its promise transferred it to plaintiff after maturity, and that the plaintiff took the note with full knowledge of all the facts, *held* that such matters constituted a complete defense to the action and a verdict for defendant was sustained.

2. **BILLS AND NOTES, § 106***—*when not negotiable.* A note drawn payable to a bank without specifying it is payable to the order of the bank or to the bank or its order, *held* not negotiable.

3. **BILLS AND NOTES, § 230***—*rights of assignee of non-negotiable note.* Assignee of a non-negotiable note takes it subject to all defenses that might be interposed by the maker against the payee.

Appeal from the Circuit Court of Jersey county; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914. Rehearing denied June 25, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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HAMILTON & HAMILTON, for appellant.

FERNS & SUMNER, and ABBOTT & EDWARDS, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

This is an action in assumpsit brought by appellant, A. H. Cochran, against C. C. Bowersox, appellee, E. M. Davis and Annie B. Cross, to recover on a promissory note, dated April 15, 1911, payable to the National Bank of Jerseyville, Illinois, bearing six per cent. interest, for the principal sum of \$5,250, due sixty days after date and executed by appellee, Bowersox. Said note is a collateral form note and recites that fourteen bonds of \$500 each of the A., J. & P. Ry. Co. were pledged as collateral security and contains power of sale of said bonds in case of default in the payment of said note. It is indorsed by Annie B. Cross, by E. M. Davis, her attorney in fact, and E. M. Davis, and is also indorsed by the bank to the order of A. H. Cochran, appellant. A credit of \$700 from the sale of the collateral security January 15, 1912, also appears on the back of said note. The declaration consists of a special count declaring on said note and the common counts. The defendant, Annie B. Cross, defaulted. E. M. Davis had not been served when the case was tried. Appellee, Bowersox, appeared and filed a plea of general issue and several special pleas, which were subsequently amended, and the case was finally tried on the plea of general issue, the second amended plea, the fourth plea and the fifth amended plea. The second plea as amended, in substance, alleges that prior to the execution of the note defendant, E. M. Davis, was indebted to the bank in the sum of \$15,000; that said bank feared said indebtedness would not pass the inspection of the National Bank Examiner; that appellee at the instance and request of said bank then and there became maker on some of the notes representing said

indebtedness of Davis as an accommodation maker for the accommodation of said bank; that said bank agreed it would not negotiate said notes; that as said notes became due, renewal notes were executed as accommodation notes under said agreement until the last renewal note, which is the note sued on; that said bank accepted said note from defendant as such accommodation maker and not otherwise; that said defendant was not indebted to said bank, or to E. M. Davis, when said notes were executed, and received no valuable consideration therefor, of which appellant had full knowledge, and that the pretended assignment of said note was made after maturity. The fourth plea avers that said note was signed by appellee as accommodation maker for and at the instance and request of said bank and E. M. Davis, the real principal; that appellee received no consideration for so signing said note; that said bank promised that said note would not be negotiated, assigned or transferred by it; that said bank in procuring said Bowersox to sign said note as accommodation maker acted through its officers and agents, one of whom was plaintiff, Cochran, who assisted and advised in that behalf, and had full knowledge that said Bowersox signed said note as an accommodation maker, and without consideration, and on said promises not to negotiate, etc.; that after the maturity of said note the same was negotiated to Cochran and received by him with full knowledge of the foregoing facts. The fifth amended plea avers that said note was signed by Bowersox as accommodation maker for and at the instance and request of said bank and E. M. Davis, the real principal; that Bowersox received no consideration; that said bank in procuring Bowersox to sign said note acted through its officers, one of whom was Cochran, plaintiff, who assisted and advised in that behalf and had full knowledge of said facts, and that said note was negotiated to Cochran after maturity and received by him with full knowledge of said facts, and that Cochran did not pay any valuable consideration for said

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note. An affidavit of amount due was filed with the declaration, and an affidavit of merits to the whole cause of action was filed with the pleas and the pleas were sworn to. Replications were filed to these pleas denying each allegation thereof. On the trial of the case a verdict was rendered in favor of appellee.

The history of this controversy began in February, 1907. At that time defendant, E. M. Davis, had organized the St. Louis Fire Insurance Company and the evidence tends to show that he desired to procure some money for the benefit of said insurance company. He was a son-in-law of Andrew M. Cross, who was president and majority stock owner of the National Bank of Jerseyville. The total amount said bank could loan to any one person under the banking laws at that time was \$6,600. Davis was already indebted to the bank on various notes aggregating \$5,500. The evidence for appellee tends to show that Mr. Cross, president of the bank, and Davis procured one C. C. Conner to sign a note for the principal sum of \$6,600, payable to the bank. Thirty-five shares of stock of the insurance company were placed in the name of Conner and assigned as collateral security for the note. Thereupon the sum of \$6,600 was deposited to the credit of the insurance company in the National Bank of Jerseyville. All the entries in the bank books concerning the transaction are in the handwriting of Mr. Cross, its then president. Conner owed the bank nothing at the time, and owed Davis nothing, and did not own any stock in the insurance company. There is no claim that any consideration ever passed to Conner for the execution of said note. Conner testified that, while he had forgotten the details of the transaction, yet it was executed at the request of Cross and Davis substantially for the reasons above stated. The note ran in the name of Conner for about a year and then was renewed in the name of Arthur J. Davis, a brother of defendant, E. M. Davis, and the collateral stock was shifted to the name of

Arthur J. Davis. In December, 1908, defendant, E. M. Davis, paid \$1,350 on the note, thereby reducing it to \$5,250. At this time the note of A. J. Davis was taken up and cancelled, and it was substituted by two renewal notes, one for \$2,700 and the other for \$2,550, both notes being executed by C. C. Bowersox, appellee, and one B. B. Sawyer, and the thirty-five shares of insurance stock deposited as collateral were again shifted, eighteen shares thereof being placed in the name of Bowersox, and assigned as collateral for the \$2,700 note, and seventeen shares being placed in the name of Sawyer, and assigned as collateral for the \$2,550 note. At this time neither Sawyer nor Bowersox was indebted to defendant Davis, nor to the bank. The latter had never been in Jerseyville, did not know any of the officers of the bank, and the evidence tends to show that prior to the taking of said last two mentioned notes Davis had a conversation with Heller, assistant cashier of the bank, about arranging to have some person sign the two notes so Davis' name would not appear on the notes, and defendant Davis testifies that the agreement between him and the bank, through Heller, was that the obligation should remain the obligation of Davis, and that the accommodation party should not be held liable and the notes would not be negotiated, and this arrangement was communicated to Bowersox. On February 1, 1909, Mr. Cross died. D. J. Murphy then became president of the bank and appellant, Cochran, who had been cashier up to this time, was made vice-president. After Mr. Cross' death, appellant Cochran, Heller and Murphy looked after this loan, and all of the transactions thereafter were consummated through one or the other of these officers of the bank. These two notes were renewed every ninety days by Sawyer and Bowersox signing new notes. All the renewal notes were sent to Davis and he paid the interest thereon, the cancelled notes were returned to him, the renewal notes to be signed were mailed to him,

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and the correspondence introduced in evidence clearly shows that the bank and its officers knew that the debt was that of Davis. The renewal of these two notes was kept up until October, 1910, when D. J. Murphy, president of the bank, wrote to defendant, Davis, the following letter:

Exhibit 25.

“Granite City, Ill., October 14th, 1910.

“Mr. E. M. Davis,

“St. Louis, Mo.

“Dear Sir:

“I have been trying to see you for some time, but so far have failed to do so, and several times I have called on the 'phone only to find you out. The matter about which I wish to see you is the loan *you* have at Jerseyville. The Sawyer and Bowersox notes are past due, and something must be done. At the last meeting of the Board of Directors it was decided that if these loans are to continue, either under the *same name or under others*, collateral form notes must be signed, and if St. Louis Fire Insurance stock is to be the collateral, the collateral must have a par value twice the amount of the loan. I do not see why two notes should be made under the conditions. It seems to me the Bowersox and Sawyer notes might just as well be combined, thus making one loan of \$5,250, with collateral in the double amount. The examiner questioned us pretty closely the last time he was there, on those loans, and we are anxious to get the matter into such shape as will leave us open to the least criticism. Will you not attend to the matter at once if you have not already done so?

“Yours very truly,

“D. J. Murphy.”

From this letter it is clearly shown that this loan was, as a matter of fact, the debt of defendant Davis and was simply carried on in the name of these various makers of the different notes and that it was immaterial to the bank who signed the notes or note. Pursuant to

this letter one note for the principal sum of \$5,250 was drawn up in lieu of the two former notes and appellee, Bowersox, was requested to sign it, which he did. The collateral stock which had been in the name of Sawyer was then shifted to the name of Bowersox, and all of said stock held as collateral for the new note, which was thereafter renewed by making new notes signed by Bowersox until the note sued on in this case was executed. After the note had been renewed in February, 1911, the bank at the request of defendant Davis turned over to him, Davis, the Fire Insurance Company stock which had been held as collateral and defendant Davis substituted therefor bonds of the A., J. & P. Ry. Co. of the face value of \$7,000. Bowersox knew nothing of such substitution, and afterwards these bonds were sold for \$700 and the note sued on in this case was credited with that amount. After the substitution of the railway bonds as collateral, at the request of the bank through Heller, cashier, defendant Davis indorsed said note on the back, also indorsed the name of Annie B. Cross by him as her attorney in fact. This note was again renewed April 15, 1911, signed by Bowersox and indorsed on the back by the same parties. The name of Davis did not appear on any of these notes in any of these transactions until the renewal note was made in February, 1911. The note after its maturity was assigned by the bank to A. H. Cochran, who was then vice-president of said bank. Cochran himself wrote many letters to Davis in regard to the different renewals of these different notes, sending the renewal notes to him and took part in many of the transactions concerning them. Heller, the cashier, also wrote a number of letters in regard to the notes. Appellant, Cochran, in a letter to Davis of March 30, 1909, says, among other things: "We also have your favor of the same date regarding notes of Bowersox and Sawyer. These notes for \$2,700 and \$2,550. We notice that you have figured the interest on the \$2,550 note at three per cent. This, we be-

lieve, represents the amount of the balance of the St. Louis Fire Insurance Company. We did not know just what your arrangement with Mr. Cross was regarding interest on this account, but if that was the arrangement between you and Mr. Cross, of course it is all right." On December 28, 1909, Cochran wrote to Davis a letter stating, among other things: "Also find enclosed notes \$2,550 and \$2,700, Bowersox and Sawyer, in renewal for those expiring 30th inst., on which you had paid the interest to 30th inst. Please have parties sign as indicated by pencil memorandum." On October 24, 1910, Heller, the cashier, in acknowledging the execution of the \$5,250 note of Bowersox in consolidation of the two notes signed by Sawyer and Bowersox, which was suggested by President Murphy's letter heretofore mentioned, wrote to Davis as follows: 'In lieu of the Bowersox note for \$5,250, sent us in your letter yesterday, enclosed herewith find note of B. B. Sawyer and C. C. Bowersox, cancelled. The interest due on the said notes amounts to \$14.88. Mr. Murphy called us up the other day and said that we could expect the examiner any day, so I was somewhat anxious to get the matter in proper shape.' The fact is established beyond any question that the indebtedness evidenced by the note sued on was that of defendant Davis and not of Bowersox. All the testimony in the case conclusively shows that all the officers of the bank, including Cochran, appellant, knew the real status of this indebtedness. The insurance company failed, as did also the railway company, and defendant Davis went to Colorado to reside. The evidence does not show that appellee, Bowersox, was a man of any financial means, and it is highly improbable that appellant, Cochran, gave any valuable consideration for the assignment of this note to him by the bank. Cochran, Murphy, Heller and Cross were all members of the board of directors of the bank and constituted a majority thereof and were conversant with all of these transactions dur-

ing all these years, and their knowledge under such circumstances must be held to be knowledge of the bank, and whatever agreement was made between them and Davis, whether the particular officer who made the agreement had authority or not, has been ratified by the bank. Heller, Murphy and Cochran all testify that they had no knowledge that this note was accommodation paper and insist that the weight of the evidence shows that it was not. Assuming this to be true and that the note was given in the usual course of business, the assignment to appellant was made after maturity with full knowledge that there was no consideration for it. Moreover, the note itself does not contain any words of negotiability, as it is payable to the bank, and not to the order of the bank, nor to the bank or its order. Under section 8 of the Negotiable Instrument Act of 1907 (J. & A. ¶ 7647), it has been held that a note so drawn is not negotiable. *Peterson v. Emery*, 154 Ill. App. 294. This is strong corroborative evidence that the agreement was that the note was not to be negotiated. If this note was not accommodation paper, appellant took it subject to all the defenses that might be interposed by Bowersox in an action on the note if brought by the bank.

If it was accommodation paper and the bank was the accommodated party, the rule is universal that the accommodated party can never recover against the accommodating party, and the note being non-negotiable and merely being executed for the purposes of accommodating the bank in covering up the indebtedness of Davis, for the purpose of passing a bank examination, and Cochran having taken this note after maturity with full knowledge of these conditions, and also of the restriction that the note should not be negotiated, and the jury having found for appellee on these issues, we think that a complete defense to the note has been made. *Keenan v. Blue*, 240 Ill. 177.

Criticism has been made in regard to some of the

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instructions and to the admission of some of the evidence, but feeling convinced that the verdict is right on the merits, we do not think there was any harmful error in regard thereto, and the judgment of the Circuit Court will be affirmed.

Affirmed.

Frances Van Wormer, Appellee, v. Metropolitan Life Insurance Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 5, 1914.

Statement of the Case.

Action by Frances Van Wormer against the Metropolitan Life Insurance Company, a corporation, to recover on three policies of insurance issued by the defendant on the life of Clara E. Cake, the beneficiary being her husband. The policy was assigned by the insured and her husband to the plaintiff. The insured, Clara E. Cake, died of pneumonia.

The only errors assigned relate to the cause of action charged in the second count of the declaration, which was based on a policy for one thousand dollars. To this count the defendant filed nine pleas setting up alleged false answers made by Clara E. Cake in her application for the policy. To these pleas replications were filed. The jury found the issues in favor of plaintiff and to reverse the judgment entered on the verdict, defendant appeals.

The application and the policy constituted the contract of insurance, and by the terms thereof the alleged false answers are representations and not warranties.

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CONKLING & IRWIN, for appellant.

SMITH & FRIEDMEYER, and SAMPSON & PUTTING, for appellee.

MR. JUSTICE ELDRIDGE delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 904*—*when verdict on issue as to false answers in application sustained by the evidence.* In an action for life insurance where the defense was that the insured made false representations in her answers to questions asked in the application concerning her health, *held* that a verdict for plaintiff could not be disturbed as against the weight of the evidence, where the questions and answers were stricken out by a long cross mark drawn through them, and there was a conflict in the evidence whether the questions and answers were in fact made and given and the weight of the evidence did not show that the answers were wilfully false.

2. INSURANCE, § 214*—*construction of answer where question in application embraces more than one question.* Answer "No" to a question asked in an application for life insurance: "Have you ever been an inmate of, or have you ever attended for treatment, an asylum, hospital or sanitarium? If yes, when, how long and for what?" construed as not constituting a false representation, since the question embraced at least three questions, and the answer so far as the evidence showed was correct as to two of them and the fact that the words "sanitarium" and "asylum" were connected with "hospital" might have misled the applicant.

3. INSURANCE, § 214*—*when answer in application not shown to be false.* Answer "No" to a question asked in an application for insurance: "Have you had any other illness than the above named?" *held* not shown to be a false representation where it did not appear that she had any other illness except trivial complaints.

4. INSURANCE, § 214*—*when answer to question in application not false.* Answer "No" to a question asked in an application for insurance: "Have you consulted any other physician?" If so, when and for what?" *held* a proper answer where no physician had been named in answer to a previous question.

5. INSURANCE, § 214*—*when answer to question in application not false representation.* Answer "None" to a question asked in an ap-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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plication for life insurance: "What is name and address of your usual medical attendant?" *held* not shown by the evidence to be a false representation, where it did not show which one of a number of physicians treating her for trivial ailments she considered as her usual physician.

6. INSURANCE, § 214*—*when answer to question in application literally correct.* Answer "No" to a question asked in an application for insurance: "Have you had any other medical attendant, or have you been prescribed for by any other physician than the above named?" *held* literally correct where no physician had been named in the application.

7. INSURANCE, § 329*—*when insurance estopped from questioning the integrity of the answers in the application.* The striking out of certain questions in an application for life insurance, *held* sufficient to put the insurance company upon notice if the application was unsatisfactory, and that the company by accepting the application in such condition and issuing the policy thereon was thereafter estopped to question the integrity of the answers.

**George E. Hawkyard, Appellee, v. H. C. Suttle,
Appellant.**

1. REFERENCE, § 9*—*right of court to adopt chancery practice in hearing exceptions to referee's report.* Upon the hearing of objections to a referee's report under section 68 of the Practice Act, J. & A. ¶ 8605, the court is not authorized to adopt the chancery practice of passing upon each exception wholly from the evidence taken before the referee.

2. ACCOUNT, § 44*—*section 68 of Practice Act construed.* The plain intention of section 68 of the Practice Act, J. & A. ¶ 8605, is to relieve the court and jury from the consideration of those items in an account over which there was no controversy, and as to the items that are excepted to contemplates that there shall be a trial *de novo* in the Circuit Court and that both parties shall have the right to introduce testimony in regard thereto the same as in other law cases.

3. REFERENCE, § 9*—*when exceptions to referee's report filed in apt time.* Facts *held* to show that exceptions to a referee's report were filed in apt time where they were among the files in the case

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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when it was considered by the court, were marked filed and there was nothing to show that they were not in fact filed.

4. REFERENCE, § 9*—*when exceptions to report deemed filed.* Exceptions to a referee's report are considered filed when they are delivered to the clerk for that purpose.

Appeal from the Circuit Court of De Witt county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 5, 1914. Rehearing denied June 25, 1914.

JOHN FULLER and LEMON & LEMON, for appellant.

WHITLEY, FITZGERALD & McLAUGHLIN and HERRICK & HERRICK, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

In January, 1905, appellant being the owner of a bank at Kenney, Illinois, also at Warrensburg, Illinois, sold to appellee the bank at Kenney for the consideration of \$8,500. Appellee afterwards claimed that the assets of the bank at Kenney had been misrepresented to him by appellant and brought this action in assumpsit against appellant to recover on numerous items of account. The trial court by virtue of section 68, chapter 110, R. S. (Practice Act, J. & A. ¶ 8605), referred the cause to a referee to take the evidence and state an account. The referee found a balance due appellant and so stated in his report to the Circuit Court. The cause came on for trial in said court, and a jury having been waived the court proceeded, over the objection of appellant, to hear the exceptions filed by appellee to the referee's report. The court reversed the findings of the referee and entered judgment in favor of appellee and against appellant for \$4,716.86. The court heard no testimony of witnesses, but adopted the chancery practice of passing upon each exception to the referee's report wholly from

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hawkyard v. Suttle, 188 Ill. App. 168.

the evidence taken before the referee, and sustained certain exceptions, overruled others, and made a final accounting therefrom and entered judgment as above noted.

Section 68 of the Practice Act provides: "All actions in which matters of account are in controversy, may, by order of the Court, be referred to some competent person or persons as a referee or referees to state and report an account between the parties, and the amount that may be due from either party to the other, which report, when confirmed by the Court, shall be final and conclusive between the parties and judgment entered thereon and execution issued in the manner provided by law in cases of arbitration and award, but either party may, within ten days after notice of the filing of the report, file exceptions thereto and demand a trial, in which case the action shall be tried as other cases, and upon such trial the report of the referee or referees shall be prima facie evidence of all the facts therein found and reported; and no other exceptions shall be considered on the trial than those filed as above provided."

The plain object of a reference of this character is to eliminate from the trial, where the accounts between the parties are numerous and varied and consist of a large number of items, all those items which are not controverted, and to have a trial only on those which are disputed and to which exceptions have been filed. The plain intention of the statute was to relieve the court and jury from the consideration of those items in an account over which there was no controversy. In many cases such a reference is of great assistance and aids in arriving at a satisfactory conclusion. *Banschbach v. Gillen*, 148 Ill. App. 222.

The statute does not contemplate, however, that upon the filing of such exceptions that the court or jury must consider the evidence taken before the referee, nor is there any authority in the statute for the court or jury

to overrule or sustain exceptions to the referee's report. The plain intention and meaning of the statute is that as to the items which are excepted to there shall be a trial *de novo* in the Circuit Court, and that as to those items a trial shall be had as in other cases at law, and both parties have a right to introduce testimony in regard thereto the same as in other law cases. The fact that in this particular case the jury was waived and the cause submitted to the court for trial does not change the rule of evidence. This section does not have the effect to change an action at law to one of chancery.

Appellant contends that the exceptions of appellee were not filed in the Circuit Court in apt time. These exceptions were first filed before the referee on December 9, 1912, and in addition thereto bear on their back the following file marks: "Filed Dec. 9, 1912, Clerk of the Circuit Court, by Deputy." The mere fact that the name of the clerk or his deputy is omitted from the file mark does not prove that the same were not in fact filed. A paper is considered filed when it is delivered to the clerk for that purpose. These exceptions were among the files in the case when it was considered by the court, and there is nothing to show that they were not in fact filed. We think the facts are sufficient to show that they were filed in apt time.

As there was no competent evidence considered by the court below, we do not feel called upon to pass upon the same, and the judgment is reversed and the cause remanded.

Reversed and remanded.

Kendrick v. Chicago & Eastern Illinois R. Co., 188 Ill. App. 172.

James Kendrick, Administrator, Appellee, v. Chicago & Eastern Illinois Railroad Company, Appellant.

1. MASTER AND SERVANT, § 98*—*power of State courts to construe Federal Employers' Liability Act.* Since the Federal Employers' Liability Act supersedes State laws covering the same field, the courts of this State must be governed by the construction placed on the Act by the Federal courts.

2. MASTER AND SERVANT, § 302a*—*Federal Employers' Liability Act construed as to defense of assumption of risk.* Section 4 of the Federal Employers' Liability Act excludes the defense of assumed risk only when the employers' violation of a statute enacted for the safety of employees contributed to the injury or death.

3. MASTER AND SERVANT, § 430*—*effect of provision as to defense of contributory negligence in Federal Employers' Liability Act.* Though by virtue of section 3 of the Federal Employers' Liability Act contributory negligence is no bar to an action for the death or injury to an employee, there can be no recovery under the act in cases where the employer was guilty of no negligence contributing to the injury or death within the meaning of such section or where the employee assumed the risk.

4. MASTER AND SERVANT, § 689*—*when recovery for death of engineer not warranted under Federal Employers' Liability Act.* In an action under the Federal Employer's Liability Act to recover for the death of an engineer resulting from a derailment of his engine alleged to have been caused by negligence of the railroad company in permitting its track to become defective and dangerous at a certain point, where the facts showed he was given orders to slow down at such point to ten miles per hour and that he violated the order by running at forty-five miles per hour, *held* that a recovery for plaintiff could not be sustained for the reason that the deceased assumed the risk of the reckless violation of the order, it appearing that the track would have been reasonably safe had the deceased not violated the order.

Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the October term, 1913. Reversed with finding of facts. Opinion filed May 15, 1914.

H. M. STEELY and H. M. STEELY, JR., for appellant.

THOMAS A. GRAHAM, for appellee; J. M. BOYLE, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. JUSTICE ELDBREDGE delivered the opinion of the court.

Appellant appeals from the judgment of the Circuit Court rendered against it in favor of appellee in the sum of \$8,000, in an action on the case for damages resulting from the death of appellee's intestate. The action is based upon the Act of Congress of April 22, 1908, as amended April 25, 1910, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," commonly called Federal Employers' Liability Act. The cause was tried upon three counts of the declaration, which are all practically the same, and aver, in substance, that appellant was a common carrier engaged in interstate commerce and set out certain sections of said Act, and further allege that the deceased, John Kendrick, was employed by the defendant in the capacity of a locomotive engineer running an engine and train known as the "Dixie Flyer" from Chicago to Danville, Illinois, and that he was then and there engaged in interstate traffic over the lines of railroad owned and leased by appellant; that it was the duty of the defendant to use reasonable care and diligence to furnish deceased a reasonably safe track and roadbed over which to operate said engine and train; that appellant, not regarding its duty, negligently permitted the southbound track to become defective and dangerous at a point, to-wit, one mile north of Martinton over which deceased was compelled to pass with said train, in this, that said roadbed was insufficiently ballasted, the ties thereof became and were loose, insecure, rotten, worn and out of repair, and was then and there extra hazardous and dangerous for trains to pass over the same, all of which appellant then and there knew, and of which extra hazards and dangers deceased did not know, and could not have known by the exercise of reasonable diligence; that while running said train towards the south on said track the tender of the engine jumped the track and threw the

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engine therefrom, causing the engine to turn over and upon deceased, by reason of which he was killed.

Appellant filed the general issue and also a special plea, the latter alleging that deceased was himself guilty of such negligence as to preclude recovery in his personal representative; that he had been notified of the dangerous condition of the track where the accident occurred and notified that in running over it he must not exceed the speed of ten miles per hour, and that after such notice and warning and order limiting speed, and with knowledge of the condition of the track, and in violation of such warning, notice and order, deceased ran his engine over such dangerous and unsafe place in the track at a speed of fifty miles per hour; that the dangerous condition in the track was only discovered two hours before the accident and that the track in its then condition was safe for an engine and train to pass over it at a speed of not exceeding ten miles per hour, but was unsafe for an engine and train to pass over it at a speed exceeding ten or fifteen miles per hour, and it was the violation of said order to run slow by the deceased which caused the accident to the train and caused the death of the plaintiff's intestate.

The sections of the Liability Act necessary to be considered are as follows:

“Section 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation, or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none,

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then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier,—or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

“Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

“Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.”

The evidence shows that this was a solid train running between Chicago and Jacksonville, Florida, and that it was the duty of deceased to act as engineer between Chicago and Danville, Illinois. The train left Chicago at 9:10 p. m., and was due in Danville at 12:26 a. m. At Yard Center, eighteen miles south of Chi-

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cago, the deceased, his fireman and conductor each received the following order:

“Train Order No. A 288.

“Danville, 6-26-12.

“To C. & E. No. 95 & 25:

“Form 19.

Yard Center.

“Reduce speed to ten miles per hour, near Auto Block 67-3, just north of Martinton. Rough place in track.

“F. E. D.

“Made complete 8:05 P. M.

8:05 P. M.

“By F. E. D.

“Willis, operator.”

When the engine arrived at a point about half a mile north of auto signal 67-3 deceased asked the fireman if this was about where the rough place in the track was and the fireman answered that it was. At this time he was running the engine at a speed of between sixty and seventy miles per hour, and at this point he shut off the throttle and after proceeding about a quarter of a mile further he applied the air brakes. At this time the train was running about forty-five miles an hour. About ten seconds after he applied the air brakes the tender and engine left the tracks, rolled over on their sides, the whole train was wrecked and deceased lost his life.

The rough place in the track was noticed by Trainmaster Freese as he was riding over it on a local passenger train between seven and eight o'clock that evening; when the train on which he was riding reached Watseka he had said slow order sent out. A number of other engineers running both freight and passenger trains received the same order, and reduced the speed of their respective trains in compliance therewith to ten miles per hour and passed over said track in safety before the accident to the train in question. The manifest weight of the evidence is that the track at the point in question was perfectly safe for the passing of trains

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running ten miles per hour. The contention of appellee is that the track being unsafe for trains passing over it at the speed of forty-five miles per hour, therefore its unsafe condition contributed to the death of deceased, and that by virtue of said Act the defense of contributory negligence and assumed risk are abrogated and appellee is entitled to recover.

It has been definitely settled that the laws of the several States, in so far as they cover the same field, are superseded by the said enactments of Congress regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce. *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1. It follows, therefore, that the courts of this State must be governed by the construction placed upon said Act by the Federal courts. Section 3 provides that in all actions brought under said Act the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence contributable to such employee, provided that no such employee shall be held to have been guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to the injury or death. This section is confined wholly to the subject of contributory negligence.

Section 4 provides that in any action brought under said Act such employee shall not be held to have assumed the risks of his employment where the violation of any statute enacted for the safety of employees contributed to the injury or death. This section is confined wholly to the subject of assumed risk.

It is contended by appellee that by virtue of section 3 contributory negligence is no defense in any case brought under said Act, and that it can only be considered on the question of mitigation of damages and not even on that question when the injury resulted from a

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violation of a statute enacted for the safety of employees; that if appellant was guilty of *any* negligence contributing to the death of deceased, then appellee is not barred from recovering even if deceased's contributory negligence was the proximate cause of the injury. This theory seems to be sustained by the case of *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887. The facts in that case show that both the plaintiff and defendant were negligent, and the negligence of defendant was not the result of the violation of any statutory duty. The court holds in that case, on the authority of *Grand Trunk Western Ry. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, that contributory negligence in such a case is no defense even though it be the proximate cause of the injury, and that it is only when the plaintiff's act is the *sole* cause that the defendant is freed from liability under the act; but an examination of the *Lindsay* case, *supra*, shows that the negligence of the employer contributing to the injury to the employee was the violation of a statutory duty in using a defective coupler, and the reasoning in that case hardly seems to be applicable to the *Wene* case, *supra*. The construction placed thereon by the Supreme Court of this State is that even if the violation of a statutory duty contributes to the injury, yet if it was not the proximate cause thereof, there can be no recovery. *Devine v. Chicago & C. River R. Co.*, 259 Ill. 449. However, assuming that the rule is as stated in the *Wene* case, was the appellant guilty of any negligence contributing to the death of deceased within the meaning and intention of section 3? The negligence charged against appellant was not the violation of any duty imposed by any statute for the safety of employees. It is unquestionably the duty of the master to furnish the servant a reasonably safe place in which to work and reasonably safe appliances with which to do that work, but the place need be only reasonably safe for the work that is to be carried on there-

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in, and the appliances need be reasonably safe only for the purpose for which they are to be used. It was the duty of the deceased as engineer to operate his engine in such manner and at such speed as appellant might order and direct. It was the duty of appellant to furnish deceased with a reasonably safe track on which to operate his engine in accordance with its orders. Appellant furnished deceased with a track reasonably safe for the operation of trains thereover at a speed of ten miles an hour. Deceased was ordered to pass over it at a speed not to exceed ten miles an hour. The track was reasonably safe for the duty which the deceased was to perform. The fact that he wilfully and recklessly violated his orders and made the track unsafe for the performance of his duty cannot enlarge appellant's original duty or increase its liability. The negligence of appellant, if there was any, did not contribute to the death of deceased within the meaning and intention of section 3 of said Act.

That Congress recognized the distinction between contributory negligence and assumed risk cannot be doubted, as each subject is treated by itself in a separate section. The Act was amended in 1910, but these sections were not changed.

Turning our attention now to section 4, which deals with the subject of assumed risk, the wording therein is radically different. This section provides that in any action brought under the provisions of said Act such employee shall not be held to have assumed the risks of his employment in any case where the violation of any statute enacted for the safety of employees contributed to the injury or death of such employee. This implies that in all other cases the doctrine of assumed risk shall prevail. Under the common law as applied in Federal jurisdictions, assumed risk has always been recognized as a defense in actions for personal injuries between master and servant (*Tuttle v. Detroit, G. H. & M. Ry. Co.*, 122 U. S. 189), and it will be noted that the act only

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excludes such defense when the violation of a statute enacted for the safety of employees contributed to the injury or death. In the late decision in the case of *Central Vermont Ry. Co. v. Bethune*, 206 Fed. 868, where the consideration of this section was directly involved, the Circuit Court of Appeals of the First Circuit held that this section limited the abrogation of the doctrine of assumed risk to instances where the violation of an express statutory duty by the carrier was charged, and that such defense was applicable to an action under the statute for the death of a railroad employee engaged in interstate commerce resulting from the alleged negligence of the railroad company in constructing its tracks too close together. The opinion reviews many decisions of Federal courts, was filed in June, 1913, and is the latest expression of said courts on the construction of section 4 that has been called to our attention.

The deceased in the case at bar was warned that the track was rough at said point and was ordered to reduce the speed of his train to ten miles an hour. He knew of the danger arising from the roughness of the track and when he, in disobedience of his orders, negligently and recklessly approached said place at a speed of between sixty and seventy miles an hour and ran over it at a speed of forty-five miles an hour, he assumed the risk and hazard of so doing. *Homersky v. Winkle Terra Cotta Co.*, 178 Ill. 562, affirming 77 Ill. App. 42; *Illinois Cent. R. Co. v. Houck*, 72 Ill. 285. The deceased assumed the risk of known dangers, and his knowledge of the defective condition of the track carried with it knowledge of its obvious danger. *Ross v. Chicago, R. I. & P. Ry. Co.*, 243 Ill. 440; *Elgin, J. & E. Ry. Co. v. Myers*, 226 Ill. 358; *McCormick Harvesting Mach. Co. v. Zakzewski*, 220 Ill. 522; *Chicago, B. & Q. R. Co. v. Camper*, 199 Ill. 569.

By so wilfully and recklessly violating said order in the manner shown by the evidence, the deceased not

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only jeopardized his own safety and life, but the safety and life of every passenger upon the train, and of every other member of the train crew. The whole train was wrecked. His action was inexcusable and from any construction of the statute involved we are unable to see how appellant can be held liable for his death.

The judgment will be reversed without remanding and with a finding of facts which the clerk is directed to embrace in the judgment herein.

Reversed with finding of facts.

Finding of facts. The court finds as matters of fact: First, that the negligence charged in the declaration was not the violation by appellant of any statute enacted for the safety of employees. Second, that appellant was not guilty of any negligence that contributed to the death of deceased. Third, that the cause of the death of deceased was a risk and hazard which he assumed.

Charles P. Wilson, Appellee, v. Hartford Fire Insurance Company, Appellant.

1. **INSURANCE, § 119***—*when liability on contract to renew policy question for jury.* In an action of assumpsit on a parol agreement to renew a policy of fire insurance to recover for a loss by fire which occurred after the expiration of the original policy, refusal of the court to direct a verdict for defendant at the close of all the evidence held proper, in view of the facts disclosed by the record.

2. **INSURANCE, § 59***—*effect of limitations on powers of agent.* A person dealing with an insurance agent, having no notice of limitations on the powers of the agent, will be justified in believing that the power of the agent is coextensive with his undertaking.

3. **INSURANCE, § 97***—*power of agent to make oral contract.* Agents of an insurance company have power to bind the company by a parol contract.

4. **INSURANCE, § 704***—*when giving of instruction based on proof of allegations of declaration reversible error.* In an action for fire

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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insurance where the declaration was defective in not alleging the interest of plaintiff in property, and the policy provided that the loss was payable to a third party, if on buildings, otherwise to the insured as his interest may appear, the giving of instructions which directed a verdict for plaintiff if the jury believed from the evidence the allegations of the declaration, *held* reversible error, as allowing recovery even if the evidence had shown that plaintiff had no interest in the property.

5. INSTRUCTIONS, § 129*—*essentials when peremptory*. A peremptory instruction must include every element necessary to a recovery.

Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the April term, 1912. Reversed and remanded. Opinion filed May 15, 1914. Rehearing denied June 25, 1914.

O. M. JONES and BARGER & HICKS, for appellant.

FRANK LINDLEY, FRED B. PENWELL and WALTER C. LINDLEY, for appellee.

PER CURIAM. This was an action of assumpsit to recover upon a parol agreement to renew a fire insurance policy at the time of its expiration. The declaration contains one count, in substance, alleging that appellant, on the tenth day of December, 1909, entered into a certain agreement with appellee, in the nature of a fire insurance policy, which policy is set out *in haec verba* in the declaration, reciting therein that for the consideration of \$48.36 the appellant insures Dr. Charles P. Wilson against loss by fire to the property, which is minutely described in the policy, for the aggregate sum of \$2,700, for the period of one year; and the declaration further alleges that before the expiration of said policy, the appellant and appellee entered into an oral agreement that appellee would leave said policy with the agents of appellant, and that appellant would, on or before the expiration of said policy, renew the said policy or contract of insurance upon the same property, for the same party and at the same price, the premium therefor to be paid by appellee when bill for

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the same should be presented for payment, and that appellee has been ready, able and willing at all times to pay said premium when requested; that notwithstanding the said agreement, the appellant failed to renew he said policy or contract for insurance, and that on the eleventh day of December, 1911, the property in the said contract mentioned was consumed by fire, "Whereby the plaintiff (appellee) then and there sustained loss and damage to the amount of the insurance thereon"; that appellee gave notice of said loss and furnished to the appellant a particular account of loss, signed and sworn to by appellee, stating "the exact nature of the title and interest of the assured"; that "he has sustained loss and damage by fire on the said property," and that the appellant failed to pay the amount provided to be paid in the event of loss.

To this declaration a plea of the general issue was filed; the cause was heard and judgment rendered against the appellant in the sum of \$2,150, and from that judgment this appeal has been perfected.

Among the other errors assigned by appellant is the refusal of the court, at the close of all the evidence, to give a peremptory instruction to the jury to find for the appellant.

This record clearly discloses the facts following: That Messrs. Hughes and Wilson were acting in the capacity of agents for the appellant at the time of the making of the contract here involved, and had been such agents for more than five years; that as such agents they were supplied with records, policies on blanks signed by the officers of appellant, reports, forms and indorsement slips, and had been, during the continuance of such agency, issuing policies upon the blanks furnished by the appellant; that the policy mentioned in the declaration was issued in this manner on the tenth day of December, 1909, for the period of one year, and the premium therefor paid to said agents and remitted to appellant; that sometime before the expiration of

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the policy, appellee took the policy back to the office of the agents of appellant and left it there, and entered into an agreement for the renewal of the policy on or before its expiration.

This parol contract of renewal was testified to by appellee and was not contradicted by either of the agents of appellant, although they were both upon the stand, nor by any one else. The proof of loss and the value of the property destroyed was established by the evidence of appellee and also that of Mr. Hughes, one of appellant's agents, and notice of loss was served upon the Company.

Under our view of the facts disclosed by this record, the court properly refused to grant the peremptory instruction asked at the close of all of the evidence by appellant.

It is further urged, as grounds of error, that the agents of appellant did not have power and authority to bind the appellant Company by a parol contract.

The rule is well settled in this State that a person dealing with an agent, having no notice of limitation of the power of the agent, will be justified in believing that the power of the agent is coextensive with his undertaking. This doctrine is well recognized and announced in the following cases: *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275; *Fire Ass'n. of Philadelphia v. Smith*, 59 Ill. App. 655; *Continental Ins. Co. v. Roller*, 101 Ill. App. 77.

So far as the law is concerned, "An insurance contract is not different from other contracts. If the minds of the parties have met in regard to the essential facts of the contract, it matters not whether such contract be in writing or by parol." Ostrander on Fire Insurance, par. 12.

The power to make contracts of insurance by parol agreement is declared in the case of *Continental Ins. Co. v. Roller*, *supra*, and also in *Firemen's Ins. Co. v. Kuessner*, *supra*.

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It is also insisted that the court erred in giving the first and sixth instructions given at the request of appellee. The first instruction is as follows: "If you further believe from the evidence that all the allegations contained in plaintiff's declaration are true, then in such state of the proof your verdict must be for the plaintiff." The sixth is very similar with the exception that it sets up the allegations of the declaration.

There is neither any allegation in the declaration that the property destroyed was the property of the appellee, nor that he had any interest therein. The policy provides that the "loss, if any, under this policy payable to A. L. Dillon if on dwelling or barn, otherwise to insured as interest may appear, subject, nevertheless, to all the conditions of this policy." The loss on the buildings is payable to Dillon. If every allegation of the declaration was proved, the instruction directs a verdict and instructs the jury to find a verdict for appellee on the proof of such allegations. A peremptory instruction must include every element necessary to a recovery. *Cromer v. Borders Coal Co.*, 246 Ill. 451; *Krieger v. Aurora, E. & C. R. Co.*, 242 Ill. 544.

Even if the evidence had shown that appellee had no interest in the property, the jury were directed to find in favor of appellee, if the allegations of the declaration were proved. The declaration being defective in not alleging the interest of the appellee, the giving of these two instructions was reversible error.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Milhim v. German Fire Ins. Co., 188 Ill. App. 186.

A. Milhim, Appellee, v. German Fire Insurance Company, Appellant.

INSURANCE, § 663*—*when evidence of incendiary origin of fire and conspiracy to defraud insurer sufficient to defeat recovery.* In an action on a fire insurance policy to recover for the loss of a stock of goods by fire, *held* that a judgment for plaintiff could not be sustained and it was reversed on the ground that the preponderance of the evidence showed that the fire was of incendiary origin, and that a conspiracy existed between plaintiff and others to defraud the insurance company by misrepresenting the value of the goods before the issuance of the policy and in fraudulently misrepresenting the value of the goods destroyed.

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1913. Reversed with finding of fact. Opinion filed May 15, 1914. Rehearing denied June 25, 1914.

CHARLES B. OBERMEYER, SPENCER EWING and WIGHT & ALEXANDER, for appellant.

DEMANGE, GILLESPIE & DEMANGE, for appellee.

PER CURIAM. This is an action on an insurance policy brought by plaintiff against defendant Company for an alleged loss by fire, whereby goods covered by this policy were damaged or destroyed. The trial below resulted in a judgment against the defendant Company for \$1,643.75 on a policy for \$1,500; the defendant prosecutes this appeal.

Plaintiff herein, a Syrian twenty-five years of age, had been in this country twelve or fifteen years, and had worked at various occupations. He married a girl by the name of Barka; his wife had two brothers in this country, one, David Barka, resided at or near Indianapolis, and the other, Samuel Barka, resided in Iowa. Plaintiff married his wife against the wishes and desires of her family, running away with her to the city of Detroit, where they remained several days; they

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

then returned to Cincinnati, where they were married. Plaintiff was located for a time in Cincinnati, but during a greater portion of the time that he has been in this country he traveled as a peddler of imported Syrian goods. On the nineteenth of August, 1910, he opened a store in the city of Bloomington, from which he claims to have supplied one hundred or more peddlers of his own country with goods, wares and merchandise which they peddled over the country.

Plaintiff did business with numerous Syrian merchants, one whose firm was conducted under the name of Brown and Company, another under the name of Solomon Brothers. Solomon Brothers had stores located in Chicago, Cincinnati and New York. On the fourth day of October, 1910, less than two months after the store was started at Bloomington, the fire occurred. At the time of the fire the plaintiff held insurance policies amounting to \$13,000 upon a stock of goods. After an investigation of the loss and the conditions surrounding the fire, the defendant Insurance Company refused to pay its policy, insisting that plaintiff, together with the Solomon Brothers, who operated the Chicago store, together with a Syrian at Springfield, Illinois, by the name of A. W. Shaheen, conspired to open the store at the city of Bloomington, secure policies of insurance thereon, set fire to the store and recover upon the policies.

Defendant insists that this condition is shown to exist by this record; that the plaintiff did not have the amount of goods in the store at Bloomington that he claims; that he was not the sole and unconditional owner of the said property, and that the place was set on fire either by plaintiff or by and through his connivance and direction in accordance with the conspiracy claimed to have existed.

In support of the contention that the store was set on fire by plaintiff, or with his knowledge and consent or under his direction, defendant produced a letter

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written by plaintiff in the Syrian language to his brother-in-law, Samuel Barka, at some town in the State of Iowa.

While plaintiff was located in Cincinnati he became involved in trouble with his wife's brother, David Barka and one Haboush, who then resided in Cincinnati but afterwards were located in Indianapolis, Indiana. After receiving this letter written by plaintiff, Samuel Barka went to Indianapolis; there he visited his brother David and showed him the letter received from the plaintiff. David Barka refused to return the letter to his brother Samuel, and it is contended by defendant that this letter contained a statement that plaintiff had recently opened a store for Solomon Brothers at Bloomington and that they intended soon to burn it; while plaintiff, on the other hand, contends that that part of the letter which is as follows:

"I give you the news I have opened a store for Solomon Brothers, and pretty soon they want to burn it" was not written in the letter by him but that that part of the letter is a forgery and was placed there by David Barka or Haboush for the purpose of revenge and injuring plaintiff, and that the motive for this forgery and revenge was induced from the fact that at one time the plaintiff drove the said David Barka from his place of business in Cincinnati, and that Haboush, the other party to the forgery, desired that his son, Louis Haboush, should marry the sister of David Barka, who was now the wife of the plaintiff, contending that Haboush desired to get rid of the plaintiff so that his son could marry this woman and that plaintiff prevented this marriage by running away with the woman and marrying her.

After Samuel Barka had given this letter to his brother David he asked David to return it and insists that David told him he had burned the letter, at least, David did not return the letter, and Samuel and David had a fight over David's failure to return it. David in

the meantime had taken the letter to a lawyer in Indianapolis named Ruick and told him the contents thereof; this lawyer then wrote to the State's Attorney at Bloomington, Illinois, to ascertain whether there had been a fire at that place in a store carried on by plaintiff, and being informed that there had been such a fire he then took the matter up with the insurance companies, furnishing them the letter. David Barka translated the letter for the Indianapolis lawyer and made an affidavit concerning it.

Plaintiff testifies that David Barka afterwards wrote him concerning this letter and concerning the forged part of it, admitting that he had committed a wrong against plaintiff, that he together with Haboush had committed the forgery with the intention of getting plaintiff into trouble and that he, David Barka, was drunk at the time he was in the office of the lawyer in Indianapolis, but notwithstanding the character and importance of this letter alleged by plaintiff to have been written by David Barka, plaintiff lost the letter and was unable to produce it at the trial, but produced David Barka at the trial and he testified to having written the letter to plaintiff and to its contents as contended by plaintiff, and testifies that after he had received this letter from Samuel, his brother, he together with Haboush went to various stores in Indianapolis for the purpose of comparing this ink and of obtaining a similar ink with which they could write in the letter the clause that it was contended was a forgery; that he and Haboush practiced upon this writing after they obtained ink that was similar and could not be distinguished from the original and wrote in the space equal to that which they contend was vacant in the letter the words, "I have a store for Solomon Brothers, and a short time they are going to burn it," or that Anton Haboush wrote the eleven words contained in the letter and he said to him, "You fix it up," and Louis Haboush said, "I will do it."

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The evidence of numerous friends and relatives of Milhim, the plaintiff, is that in their opinion these words in this letter is a forgery, but the preponderance of the evidence by disinterested parties who did not know plaintiff is that the lines alleged to be a forgery are written in the same hand and with the same ink as the balance of the letter.

The greater part of the goods contained in this store at Bloomington were furnished by the Solomon Brothers, who claimed to have stores in Chicago and New York. There are seven Solomon brothers, who operated under various names, in one place under the name of Brown and Company and in another under the name of Farris. One of the Solomons was known in Bloomington and Springfield as Charles Farris, but his real name was Charles Solomon. This Charles Solomon denies having been at these places, and especially at Bloomington a day or two before the fire, but the evidence is conclusive that he was at these places and that he is the same person that was known in Springfield and Bloomington as Charles Farris.

This firm of Solomon Brothers, or J. Brown and Company, had been adjudged bankrupts but a short time before they claim to have furnished these goods to the plaintiff, and while it is claimed that plaintiff is in debt to them on account of purchases made by him for the Bloomington store, yet in the schedule of creditors of the firm of Solomon Brothers or Brown and Company in the bankruptcy proceedings appears the name of the plaintiff. This schedule discloses that the bankrupt firm was indebted in the sum of \$411.28 to plaintiff who, as well as going by the name of A. Milhim, was also known as Abraham Corey. This name also appears in the bankrupt schedule as a creditor of the firm to the amount of \$117.35; plaintiff was also known by the name of Abraham El. Khourey. This name also appears upon this schedule as a creditor of the bankrupt firm to the amount of \$205; plaintiff sometimes

adopted the name Abraham El. Corey, and this name also appears in the schedule of the bankrupt as a creditor to the amount of \$177.34. These accounts are all listed as desperate in the bankruptcy proceedings.

Charles Solomon, under the name of Farris, was a frequent attendant and helper at the store of Shaheen and Company in Springfield. One Abram Farrah, a Syrian, testifies that he was at work for Shaheen and Company while Charles Solomon, *alias* Farris, was here and that afterwards the Shaheen store was burned in Springfield; that during the time that he was employed in the store Charles Solomon, *alias* Farris, together with other persons who came to the store, were engaged in changing the books or making a set of books for the Shaheen store at Springfield; that after having completed one set, Charles Solomon remarked that they were not sufficient and that they could not be relied on; that he put them in the stove and burned them, and that afterwards another set was prepared which was used as a basis of recovery for the loss at the Shaheen store. Farrah further testified that he heard a conversation at the Shaheen store between his uncle and Charles Solomon in which his uncle said, "I am surprised, Abram Milhim had a store, had about five hundred dollars worth of goods in the store and he had a fire and is going to get twelve thousand from the insurance company, see how smart and clever he is," and that to this remark Charles Solomon replied, "Not because he was smart and clever that he is going to get that, because we were smart and clever, we did that, we give him the lesson, and showed him how he is going to get twelve thousand dollars for five hundred dollars worth of goods, we were to teach you the same, and you would not listen." This witness then testifies that he was called into the presence of his uncle and Charles Solomon and they told him if anything happened to the store they wanted him to keep quiet, and when he threatened to tell the truth about what he had seen and

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heard, Charles Solomon then told him to go away so that he could not and would not be called upon in case of any proceedings had concerning the change of the books or the conversation he heard.

While plaintiff contends that he knew nothing of the loss or the cause of the fire in Bloomington and that he had from \$17,000 to \$19,000 worth of goods in this store and that they were virtually all destroyed by fire, the evidence is conclusive that the fire in this store did not cover a space over ten by twelve feet and was in the rear of the store that had an area of nine hundred and sixty square feet; that the goods that were destroyed were not of an expensive character; the total value of the goods in the seven-eighths of the store that was not burned amounted to \$2,100; and that it was utterly impossible from the extent of the fire that occurred in this room on that night that any such an amount of goods as claimed by plaintiff could have been destroyed. The goods within the space burned over were not all burned, some were kicked out on the sidewalk by the firemen or trampled upon on the floor and a few fell out of the rear door where the glass had been broken.

On the night of the fire plaintiff was in the city of Chicago, having gone there the day preceding, and received a telegram on the morning after the fire to return home. While Milhim was in Chicago he visited the Solomon Brothers. The evidence further discloses that two persons, a Miss Marx and a Miss Davidson, were employed at various times working upon the books in the store of Milhim at Bloomington and made entries in these books.

Miss Marx made the index to the ledger kept at that store, although Milhim denies that she was ever there or ever worked upon his books; he also denies that Miss Davidson ever worked upon the books, although the evidence is conclusive that she did. The books produced by plaintiff for the purpose of establishing the amount of his loss in this store, these witnesses testify, are not

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the books upon which they worked or in which they made entries.

The evidence in this record is very voluminous, and it is very conflicting; but after a careful examination of the entire record and the character of the evidence, we can only arrive at the conclusion that the manifest weight and clear preponderance of the evidence in this record discloses and proves to our satisfaction that the fire was of incendiary origin; that a conspiracy existed between Solomon Brothers and plaintiff for the purpose of defrauding the defendant Insurance Company, and that the books produced upon the trial for the purpose of proving the amount of goods contained in this store at the time of the fire are fraudulent and were made as a result of the conspiracy between Solomon Brothers and Milhim; that Solomon Brothers are interested in this store; that Milhim is not the sole and unconditional owner of this property, and that the plaintiff and Solomon Brothers are guilty of an attempt to defraud the Insurance Company. For these reasons this judgment cannot be permitted to stand, and it will be reversed with a finding of fact. The clerk will enter in the judgment rendered in this court that plaintiff with others was and is guilty of an attempt to unlawfully and fraudulently carry out a conspiracy entered into by them to defraud the defendant Insurance Company by misrepresenting the value of the goods insured before the issuance of the policy and that he fraudulently misrepresented the value of the goods destroyed.

The judgment is reversed.

Reversed with finding of fact.

**First National Bank of Arcola, Appellee, v. J. R. Heeb,
Appellant.**

1. GUARANTY, § 36*—*when testimony as to existence of stamped guaranty over signature inadmissible.* In an action by a bank against defendant as guarantor on notes, where the issue was whether the guaranty was stamped on the notes when they were indorsed to the bank by defendant, testimony of the cashier that the guaranty was on the notes over the signature of defendant the first time he saw the notes, which was a few days after the notes were taken by the bank, *held* inadmissible as being too remotely connected with the issue before the jury.

2. APPEAL AND ERROR, § 1507*—*when cross-examination of witness harmless.* In an action against an indorser on an alleged guaranty written above the name of the indorser, permitting a witness who testified on behalf of the defendant to be asked on cross-examination whether the bankruptcy proceedings against the maker of the note was voluntary or involuntary, *held* harmless error.

3. WITNESSES, § 227*—*when cross-examination improper.* In an action by a bank against defendant on an alleged guaranty on promissory notes where the issue was whether the guaranty was stamped on the notes when defendant indorsed them to the bank, an objection to a question asked of the cashier of the bank on cross-examination, "if on other notes in the bank he had not noticed the signature was in with the stamp or underneath it as a rule," *held* properly sustained, where the notes asked about were not in the case or presented to him for inspection and the question did not pertain to anything testified to by the witness.

4. GUARANTY, § 36*—*admissibility of evidence to prove time guaranty was stamped on note.* In an action against a defendant on his alleged guaranty on promissory notes where the issue was whether the guaranty was stamped on the other notes when defendant indorsed them to plaintiff, the defendant on rebuttal offered in evidence two experimental exhibits, one being a stamp impression on paper with a signature written over the stamp, and the other being a stamp impression over a signature, and then asked witnesses if they could distinguish whether the stamp mark or the signature was made first, *held* that objections to the exhibits and questions were properly sustained, for the reason that such evidence could be offered by defendant only when making out his defense, and not in rebuttal, and because the stamping and writing were not shown to have been executed under similar conditions to those in controversy.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. **BILLS AND NOTES, § 462***—*when instruction as to extension of time of payment not objectionable.* In an action against defendant on his alleged guaranty on promissory notes, an instruction given for plaintiff on the question whether defendant was relieved from liability by an extension of time to the maker for the payment of the notes, *held* not subject to the objection that it was "a complete instruction to find for the plaintiff if the notes were guaranteed."

6. **BILLS AND NOTES, § 462***—*when instructions as to contract of guaranty of indorser erroneous.* In an action against defendant on his alleged guaranty on promissory notes, where the issue was whether the guaranty was stamped on the notes before defendant indorsed them to the plaintiff, an instruction given for plaintiff and another given for defendant as modified, *held* erroneous, as allowing a recovery if the defendant agreed to guaranty the notes before he indorsed them to the plaintiff, but *held* that the giving of plaintiff's instructions and the modification of defendant's instructions were harmless in view of special findings of the jury.

7. **BILLS AND NOTES, § 433***—*when parol evidence inadmissible to vary terms of payee's indorsement.* The name of the payee appearing on the back of a note is evidence that he is an indorser, and parol evidence of what occurred before the indorsement is not admissible to contradict or vary the contract of indorsement.

8. **APPEAL AND ERROR, § 1523***—*when error in giving or refusing instructions harmless.* Where special findings by a jury show that appellant was not injured by the refusal of a correct instruction or the giving of an incorrect instruction, the error is harmless.

9. **APPEAL AND ERROR, § 1012***—*when improper remarks of court or counsel not preserved for review.* Improper remarks of court or counsel are not preserved for review, where no objection was made to the remarks of the court and neither was mentioned in the written motion for a new trial.

10. **APPEAL AND ERROR, § 613***—*when grounds for new trial waived.* Grounds for a new trial not set forth in a motion for a new trial are waived where the motion was in writing.

Appeal from the Circuit Court of Coles county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 2, 1914.

ABEL L. ALLEN and H. A. NEAL, for appellant.

JAMES W. and EDWARD C. CRAIG and DONALD B. CRAIG, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an appeal from a judgment rendered in favor of the First National Bank of Arcola against J. R. Heeb as guarantor on five promissory notes.

The notes were executed by the Home Herald Company of Chicago to J. R. Heeb. One note dated November 19, 1909, is for \$550 due three months after date and was transferred to appellee during the same month; the other notes are for \$500 each and are dated January 4, 1910; three of them were due February 26, 1910, and the other was due three months after date. The notes dated January 4th were transferred to appellee January 6, 1910. All the notes bear interest at the rate of six per cent. and are indorsed, "For value received I hereby guarantee payment of the within note, and waive demand, notice and protest on same when due. J. R. Heeb."

The declaration contains five special counts and the common counts. Each special count avers the liability of appellant as guarantor on one of the notes. The pleas are the general issue, a plea to each count averring that the notes were indorsed in blank and that the time of payment was extended by appellee to the Home Herald Company without the consent of appellant, and a plea to each count denying the guaranty verified by affidavit. The appellant joined issue on the general issue and the pleas denying the guaranty and filed replications denying the indorsement of the notes in blank and the extension of time, on which issues were joined. The case was tried by a jury, and a general verdict returned for \$3,059.25 in favor of appellee together with special findings.

The controversy is (1) whether the liability of appellant was that of a guarantor or that of an indorser; and (2) whether the time of payment of the notes was extended without the consent of appellant.

The evidence on behalf of appellee shows that appel-

lant was an employee of the Home Herald Company of Chicago; that he had formerly resided in Arcola, Illinois, and was a boyhood friend of J. R. Beggs, the president of the First National Bank of Arcola; and that appellant while visiting his relatives in Arcola, in October, 1909, met Beggs and told him he expected to get some notes from the Home Herald Company and asked him whether the appellee would buy them, and that Beggs replied that the bank would buy them on condition that appellant would guarantee them, and that he, Beggs, didn't know anything about the Home Herald Company and would only buy them on the strength of appellant's guaranty, and that the notes would have to be sent to the bank for inspection.

The evidence on the part of appellee further shows that the notes shortly after their dates, the \$550 note at one time and the remaining four notes at another time, were sent to the bank without any indorsement, and that the bank stamped the guaranty across the back and returned them to appellant for his signature under the guaranty; that the notes were thereafter returned to the bank with appellant's name written under the guaranty and the notes were then taken at a discount of one per cent.

The evidence for appellant is that the notes were forwarded to appellee with his indorsement without any guaranty on them and without any previous arrangement for discounting them.

After the discounting of the notes appellant went to Europe, where he remained until the fall of 1910. Each of the notes were presented for payment when they fell due, and all except the note maturing April, 1910, were protested for nonpayment. The Home Herald Company in April, 1910, became an involuntary bankrupt. Shortly after the note first maturing was protested for nonpayment, one Johnson, secretary of the Home Herald Company and of the World's Events Company, which succeeded the Home Herald Company, went to

Arcola on behalf of the Home Herald Company and wanted an extension of the time of payment of the five notes. The evidence of Beggs and Allison, the cashier of the bank, is that Beggs stated to Johnson that appellee was looking to appellant for payment of the notes on his guaranty, and that appellant was in Europe and that appellee could not extend the time of payment for the reason that would release appellant; that he would not even receive the interest due on the notes and protest fees for fear such act would release appellant; that Johnson stated he was going to send appellee a note and some stock in the World's Events Company as additional security to protect appellant, and that Beggs stated that whatever Johnson wanted to leave for appellant would be all right, but that appellee would not extend the time of payment or do anything in the absence of appellant that would jeopardize the rights of appellee against appellant.

Johnson did send a note made by the Home Herald Company for \$2,550 payable to the First National Bank of Arcola four months after date and a certificate for twenty-five shares of preferred stock in World's Events Company, the note reciting that it is given as collateral to the five notes given to appellant.

Beggs received this \$2,550 note and stock accompanying it, kept it in his desk, but would not accept it, and did not return the five original notes, and testified that he made no arrangement or agreement for any extension of the time of payment of any of the five notes.

It is insisted that the court erred in permitting Allison, the cashier, to testify that the guaranty was on the notes over the signature of appellant the first time he saw the notes. This was a few days after the notes were taken by the bank. This evidence was but very remotely, if at all, connected with the issue before the jury. It was, however, before any controversy had arisen between the parties and was a circumstance entitled to little, if any, weight.

It is also contended that the court erred in permitting Johnson, a witness who testified on behalf of appellant, to be asked on cross-examination whether the bankruptcy proceeding against the Home Herald Company was voluntary or involuntary. It had been proved without objection that the Home Herald Company had been adjudged a bankrupt. Thereafter, on re-examination of the witness Johnson, appellee was permitted over objection to show that it was an involuntary bankrupt. That was immaterial but was harmless error.

On the cross-examination of Allison, the cashier of the bank, an objection was sustained to a question, "If on other notes in the bank he had not noticed the signature was in with the stamp or underneath it as a rule"? The other notes asked about were not in the case or presented to him for inspection. How other parties might place their names was immaterial and was not cross-examination of anything testified to by the witness.

In rebuttal, appellant sought to introduce in evidence two experimental exhibits, one was a stamp impression on a paper on which a signature had been written over the stamp, in the other the signature was first written on the paper and then the impression from the stamp placed over the signature. The evidence showed that these experimental stamp marks and signatures were substantially made at the same time. Witnesses were asked if they could distinguish which was placed first. Objections were sustained to the questions and these exhibits. This it is contended was error. The objection to this evidence, if it had been otherwise competent, was properly sustained for two reasons: First, because the evidence, if competent, should have been offered in making out the defense and not in rebuttal; and second, because the stamping and the writing were not shown to have been executed under similar conditions to the stamping and writing in controversy. The stamping and writing in appellant's exhibits occurred

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substantially at the same time, while the stamping and writing on the notes in controversy were several hours apart. 5 Ency. of Evidence, 483. There is no reversible error either in the admission or rejection of evidence.

The appellant contends that the court erred in giving appellee's eighth instruction. Counsel for appellant set forth in their brief the instruction under quotation marks as follows:

"The Court instructs the jury that to release a guarantor from payment of a note that he has guaranteed to pay, the holder of the note must agree to not only extend the time of payment of the note, but must agree to extend the time of the payment for some definite fixed time and must receive for the agreement to extend the time a valuable consideration and the extension must be made without the consent and knowledge of the guarantor; and if any of these elements are lacking the guarantor is not released.

"So in this case, if you believe from a preponderance of the evidence that the defendant guaranteed the payment of these notes at the time he sold them to the plaintiff, then, and in that case, the defendant is liable to the plaintiff on the said notes and your verdict should be for the plaintiff."

Counsel say: "It is a complete instruction to find for the plaintiff if the notes were guaranteed." A reference to the abstract and record shows that they have omitted a subsequent and very material part of the instruction, which is: "And the only way the defendant can free himself from such liability under the issues in this case is to prove by a preponderance of the evidence that the plaintiff agreed with the Home Herald Company without his knowledge and consent to extend the time of payment of the said notes for four months and that the plaintiff did so in consideration of the Home Herald Company putting up with it this note for \$2,550 and the stock certificate introduced in evidence,

but if you believe from the evidence that the defendant guaranteed the payment of these notes and that the defendant has not proven the defense of extension of time of payment as herein outlined, by a preponderance of the evidence, your verdict should be for the plaintiff.”

The omitted part of the instruction remedies the objection that the instruction directs a verdict if the jury believe the guaranty was proved.

It is also insisted that the court erred in giving appellee's thirteenth instruction and in modifying appellant's fourth. The appellee's thirteenth tells the jury that if they believe from a preponderance of the evidence that appellant agreed to guaranty the notes before the notes were discounted, then it is immaterial when the stamp was put on the notes, as the appellee in that state of the proof would have the right to place the guaranty stamp on the notes after the appellant had indorsed his name thereon. The appellant's fourth instruction as asked states that the verdict must be for the appellant if the jury believe the notes were indorsed in blank and sent to the bank and the guaranty stamp was placed on the notes after their receipt by the bank. The instruction makes no reference to any agreement to guarantee the notes made either prior or subsequent to the indorsement. The court modified the instruction to correspond with appellee's thirteenth.

If the appellant at the time of or after signing his name on the back of the notes authorized the guaranty to be placed above his name before appellee would discount them, then the appellee would have the right to place the guaranty there. *Kaestner v. First Nat. Bank of Chicago*, 170 Ill. 322. The general rule, however, is that the name of the payee appearing on the back of the instrument is evidence that he is an indorser, and parol evidence of what occurred before the indorsing of the name is not admissible to contradict or vary the contract of indorsement. *Lloyd & Co. v. Matthews*, 223

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Ill. 477; *Johnson v. Glover*, 121 Ill. 283; *Hately v. Pike*, 162 Ill. 241; *Martin v. Cole*, 104 U. S. 30. We find nothing in the Negotiable Instrument Act changing this well-settled rule regarding the transfer of negotiable paper. We conclude that appellee's thirteenth instruction and the modification of appellant's fourth were erroneous, but this error in the instructions is shown to be harmless by the special findings returned by the jury.

At the request of the appellant the jury were instructed to answer the following interrogatories:

"First: Did the plaintiff accept of the Home Herald Company a note for \$2,550 dated February 26, 1910, due in four months after date and a certificate for twenty-five shares of preferred stock of the World Events Company, and did it, in consideration of said notes and stock, extend the time of payment of the five notes sued on in this case, for the period of four months from February 26, 1910?"

"Second: Was the guaranty which appears upon the notes offered in evidence, on said notes at the time they were indorsed by the defendant?"

"Fourth. Were the guaranties appearing on the notes offered in evidence placed thereon after they were indorsed by the defendant?" The jury answered the first, "No," the second, "Yes," and the fourth, "No."

The special findings of fact returned by the jury on the interrogatories requested by the appellant show that they found that the guaranty stamp was placed on the back of the notes before the signature of the payee was indorsed thereon. There was no objection to any evidence introduced on the question of the guaranty or the agreement to guarantee. The jury having found the facts against the appellant, that the guaranty was first placed on the notes, the appellant was not harmed by the giving of the erroneous instructions since, under the special finding of fact, the jury could not have found otherwise than for appellee. Where special findings by

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a jury show that appellant was not injured by the refusal of a correct instruction or the giving of an incorrect instruction, the error is harmless. *Avery v. Moore*, 133 Ill. 74; *Godfrey v. Phillips*, 209 Ill. 587; *Schillinger Bros. Co. v. Smith*, 225 Ill. 74; *Mt. Olive & S. Coal Co. v. Rademacher*, 190 Ill. 543; *East St. Louis Connecting Ry. Co. v. O'Hara*, 150 Ill. 586.

It is also assigned for error that the trial court made improper and prejudicial remarks on the trial and that, "Counsel were guilty of misconduct in remarks made to the jury which tended to prejudice the defendant." It is an answer to both these assignments, that no objection was made to the remarks of the court and that the motion for a new trial which is in writing does not mention either as a reason for a new trial. If the reasons for a new trial are specified in writing, all grounds for new trial not set forth in such written motion are waived. *Yarber v. Chicago & A. Ry. Co.*, 235 Ill. 589; *Metropolitan West Side El. R. Co. v. White*, 166 Ill. 375.

It is the peculiar province of the jury to judge of the weight of the evidence and the credibility of the witnesses. The evidence being in direct conflict and the trial court having approved of the verdict, this court cannot say that the verdict and judgment are against the manifest preponderance of the evidence. The judgment is therefore affirmed.

Affirmed.

Earnest Favro, Administrator, Appellant, v. Superior Coal Company, Appellee.

1. MINES AND MINERALS, § 141*—*when declaration not demurrable as stating too high a duty.* In an action to recover damages for the death of a mule driver in defendant's mine, a statement in the declaration that it was the duty of defendant to furnish proper and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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suitable means and appliances, *held* not to render the declaration subject to a general demurrer on the ground it states a higher duty than the law requires since the statement, in so far as it imposes too high a duty, may be regarded as surplusage, when from the facts stated the law will imply a legal duty.

2. WORKMEN'S COMPENSATION ACT, § 5*—*sufficiency of declaration in suit based on Workmen's Compensation Act.* Where an employer within the meaning of the Workmen's Compensation Act of 1911, J. & A. ¶¶ 5449, *et seq.*, has elected not to accept the provisions of the act in a suit against him to recover for the death of an employee, the declaration need not allege that the employee had or had not accepted the act, since under the act the rejection of it by the employer precluded the employer from right of election.

3. WORKMEN'S COMPENSATION ACT, § 2*—*when employee precluded from right of rejecting provisions of Compensation Act.* Under the Workmen's Compensation Act of 1911, J. & A. ¶¶ 5449, *et seq.*, the employee has no right of election where the employer has elected not to accept the provisions of the act.

Appeal from the Circuit Court of Macoupin county; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded with directions. Opinion filed July 2, 1914.

JAMES H. MURPHY and D. G. WILLIAMSON, for appellant.

EDWARD C. KNOTTS, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an action on the case begun by the administrator of the estate of Olindo Barnardino, deceased, to recover damages from the Superior Coal Company for negligently causing the death of the intestate. The declaration contains one count. A demurrer was sustained to it, and judgment rendered against plaintiff in bar of the action. The plaintiff appeals.

The declaration avers that the defendant on May 25, 1912, and for one year next preceding in Macoupin county, controlled, operated and managed a certain coal mine and was engaged in mining and raising coal

*See Cumulative Quarterly, same topic and section number.

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from said mine and employed divers employees in and about said work, and by means of the premises came within the provisions of a statute of the State of Illinois, entitled "An Act to promote the General Welfare of the People of this State by Providing Compensation for Accidental Injuries or Death Suffered in the Course of Employment" (J. & A. ¶¶ 5449 *et seq.*), and avers that on or before May 1, 1912, defendant filed with the State Bureau of Labor Statistics a notice in writing of said defendant's election not to provide and pay compensation according to the provisions of said act, and was not, at the time of the injury and death of said Barnardino, bound to pay its employees the compensation provided by said act; avers that on the day aforesaid in a certain entry in said mine, etc., plaintiff's intestate was then and there and for more than a month prior thereto had been employed by the defendant as a driver, and was on said day at work as such driver in said entry and in pursuance of his said employment engaged in driving a certain mule hauling two mine cars along said entry in a southerly direction at a certain described location, said mule being attached to the forward car by means of a tail chain having a hook at the end thereof fastening the same to said car; that it was the duty of defendant to furnish to intestate for use in his work as aforesaid proper and suitable means and appliances to perform his said work as a driver with reasonable safety; that the defendant negligently failed to perform its duty in that behalf, but on the contrary furnished a certain tail chain which was unsafe and defective in that it had a flat hook at the end to be attached to a car for hauling the same; that said hook was not sufficiently curved and was therefore likely in the course of intestate's work to become unfastened from the car and cause said intestate to fall in front of the car and be injured or killed, all of which defendant knew or by the use of ordinary care would have known; that while

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the intestate was driving said mule hauling said two cars of coal, etc., said hook by reason of the defect aforesaid. became detached from said car causing the intestate, then and there riding on said car in the usual manner, to fall in front of said car, by means whereof the car ran upon the intestate with great force and violence, whereby his skull was fractured and by reason whereof he shortly thereafter died; avers that said intestate left surviving his father, mother, brothers, and sisters, etc., as his only heirs, etc.

The demurrer is only a general one. One contention of defendant is that the declaration averring "that it then and there became and was the duty of the said defendant to furnish to the plaintiff's intestate proper and suitable means and appliances" is an express allegation of a positive duty and makes the defendant an insurer. The declaration avers the facts on which a recovery is sought, and fully states the facts wherein it is averred the defendant was negligent and which it is averred were known or with reasonable care would have been known to defendant. The statement of the duty stronger than the law requires is surplusage, when the facts are stated from which the law will imply the legal duty of the employer. The statement that it was the duty of defendant to furnish proper and suitable means and appliances includes the statement that it was the duty of defendant to use reasonable care to furnish means and appliances which were reasonably safe when the facts are stated.

It is further contended that the declaration is fatally defective because it makes no averment concerning the acceptance or rejection by the appellant of the Employers' Liability Act. Under the act the employer must first elect whether to pay the compensation fixed by the act or remain liable for damages under the law as it was prior to the taking effect of the act, deprived however of certain defenses. If the employer elects to pay compensation under the act then the employee is also bound by the act unless, within

thirty days after the hiring or taking effect of the act, he shall file a notice of his rejection of the act. If the employer elects not to accept the provisions of the act then he is penalized by being deprived of the defenses of assumed risk, negligence of a fellow-servant and want of ordinary care or contributory negligence of the employee. While if the employer elects to pay compensation according to the act then the employee may by filing a notice, elect not to accept compensation under the act and may retain his claim for damages under the law prior to the taking effect of the act, and in that event the employer may interpose the defenses of assumed risk, negligence of a fellow-servant or contributory negligence.

Where an employer refuses to accept the provisions of the Act of 1911, an employee has no option in the matter. It is only when the employer accepts its provisions that the employee may reject it and must give notice thereof. Employer and employee automatically accept the provisions of the act by not filing an election not to accept the act, and under the act the employee only has the right of election where the employer has elected to accept its provisions. It was unnecessary to aver that the employee either had or had not accepted it, since under the act the rejection of it by the employer precludes the employee from rejecting it. It was said in *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419, where the declaration contained an averment that the plaintiff had accepted the act: "We find no provision in the act which confers upon the employee the right to elect to be governed by the act in his relations to an employer who has rejected the act. * * * This averment, however, may be regarded as surplusage and of no legal consequence whatever." We conclude, therefore, that the court erred in sustaining the general demurrer. The case is reversed and remanded with instructions to overrule the demurrer.

Reversed and remanded with directions.

The People v. Young, 188 Ill. App. 208.

The People of the State of Illinois, Defendant in Error, v. Adrian Young, Plaintiff in Error.

1. **INDICTMENT AND INFORMATION, § 34***—*sufficiency of allegation as to time of offense.* Where the information alleges the time of the offense under a *vide licet*, the allegation of the precise time is not necessary except that the allegation and proof must bring the offense within the statute of limitations.

2. **CRIMINAL LAW, § 120***—*when evidence of other offenses admissible.* Evidence of the acts of the accused at other times than the particular one for which he is on trial is competent for the purpose of showing intent.

3. **MASTER AND SERVANT, § 873***—*when instructions as to what constitutes violation of section 159 of Criminal Code erroneous.* In the trial of an information charging defendant with a violation of section 159 of the Criminal Code, J. & A. ¶ 3779, prohibiting a person from seeking to prevent any other person from working or obtaining work, by threat, intimidation or unlawful interference, instructions informing the jury as to what constitutes intimidation and that intimidation might include following or spying after a person if done to prevent his working at a lawful business, *held* erroneous.

4. **MASTER AND SERVANT, § 873***—*acts not constituting violation of section 159 of Criminal Code.* Under section 159 of the Criminal Code, J. & A. ¶ 3779, union men or other employees have the right to seek, by peaceable persuasion, to induce others to leave or refrain from working for their employers, if the persuasion is not in the nature of intimidation or coercion.

5. **INSTRUCTIONS, § 129***—*requisites when peremptory.* A peremptory instruction should include every element requisite to the returning of a verdict as directed.

Error to the County Court of Adams county; the Hon. LYMAN McCABE, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed July 2, 1914.

WALTER H. BENNETT, for plaintiff in error.

FRED G. WOLFE and ROLLAND M. WAGNER for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an information filed in March, 1913, in the County Court of Adams county, by the prosecuting attorney, against Adrain Young charging the defendant with a violation of section 159 of the Criminal Code (J. & A. ¶ 3779) which provides: "If any person shall by threat, intimidation or unlawful interference, seek to prevent any other person from working or from obtaining work at any lawful business, on any terms that he shall see fit such person so offending shall be fined not exceeding \$200."

The defendant entered a plea of not guilty and upon a trial before a jury was found guilty and sentenced to pay a fine of \$50 from that judgment, the defendant prosecutes this writ of error.

The information, under a *videlicet*, charged the defendant with having committed the offense on March 18th. The People introduced evidence tending to show the commission of the offense on the 18th, and of similar offenses on the 10th and 15th of the same month.

The plaintiff in error was a member of a Carpenter and Joiner's Union in Quincy that had been on a strike for about six months, and the prosecuting witness, Fred Westhaus, was an employee in one of the factories against which the strike had been declared but who had continued at work after the strike had been declared by the union. The evidence further tended to show that on March 18th an officer approached Westhaus when he was on his way home from work and accused him of carrying concealed weapons; that while the officer was searching Westhaus, the plaintiff in error came up and told the officer that it was Westhaus' mother who carried a gun. This apparently is about all that occurred at that time. The evidence by different witnesses tends to show that on the 10th and 15th, of the same month, the plaintiff in error with

other men had followed Westhaus on his way home from work and called him vile names. The plaintiff in error denied either using any vulgar language or calling the prosecuting witness names, and says that he lived out in the direction that Westhaus did and that all he did on the 10th and 15th was to try and reason with Westhaus and persuade him to join the union.

It is insisted the court erred in admitting evidence concerning what occurred on other days than the 18th, the time alleged in the information. The time alleged is stated under a *videlicet*; the allegation of the precise time was not necessary, except that the allegation and the proof must bring the offense within the statute of limitations. We hold also that the evidence of the acts of the plaintiff in error at other times, than the particular one for which he was on trial, was competent for the purpose of showing intent. *People v. Hag-enow*, 236 Ill. 528; *People v. Moeller*, 260 Ill. 375.

It is contended also that the court erred in giving three instructions for the People and modifying one requested by plaintiff in error. The third instruction given for the People is: "The Court instructs the jury that intimidation means to put a person in fear and may include following him, spying after him, stopping and threatening him or assuming a threatening attitude toward him and if done to prevent his working at a lawful business or on terms as he may see fit are unlawful and each of said acts for said purpose is unlawful and in this if you believe from the evidence beyond a reasonable doubt that the defendant did commit any one or more of said acts for said purpose, then you should find the defendant guilty as charged in the information."

The fourth is the same, in substance, with the exception that it is an abstract proposition. The fifth is: "The Court instructs the Jury that if the things done or words spoken are such that they will excite fear or

reasonable apprehension of danger and so influence those for whom designed as to prevent them from freely doing what they desire and the law permits, such acts and words are unlawful, and in this case if you believe the conduct of the defendant was such as to excite fear or reasonable apprehension of danger on the part of Fred Westhaus and designed to influence him to prevent him from doing what he desired and the law permits in working, then the defendant is guilty as charged in the information and you should find him guilty by your verdict."

The second instruction requested by the plaintiff in error is: "The Court further instructs the Jury that a strike is not unlawful; that members of labor unions may singly or in a body quit the service of their employer, and for the purpose of strengthening their association, may persuade and induce others in the same occupation to join their union." This the court modified adding the following words: "*But in doing so no striker would be warranted in following a Non-union man against his will, spying after him, stopping or threatening him, or using any words or language that would in any way intimidate him.*"

Counsel for defendant in error rely upon the cases of *Franklin Union No. 4 v. People*, 220 Ill. 355, and *Doremus v. Hennessy*, 176 Ill. 608, as authority for the giving of the third and fourth instructions and the modifications of the plaintiff in error's instruction. The People's instructions inform the jury that "intimidation means to put a person in fear, and may include following him, spying after him, stopping and threatening him or assuming a threatening attitude toward him and if done to prevent his working at a lawful business or on terms as he may see fit are unlawful and each of said acts is unlawful," and if the jury believe from the evidence that the plaintiff in error "did commit any one or more of said acts for said purpose," then the jury should find him guilty. The

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different acts are disjunctively connected together by the word "or," it tells the jury that if the plaintiff in error followed the prosecuting witness, or spied after him, to prevent his working at a lawful business the plaintiff in error should be found guilty. The statute only makes intimidation or unlawful interference that seeks to prevent another person from working an offense. In the *Franklin Union* case, *supra*, which was an attachment for contempt for violating an injunction, it was said: "To follow him, to spy after him, to stop him and threaten him, to put him in fear, to intimidate him or to coerce him are alike unlawful." As we understand, the principal there announced is, that to follow and spy after for the purpose of intimidation or coercion are unlawful. To follow and spy after are not of themselves criminal and only become such when done for the purpose of intimidation. Union men or any other employees have the right to seek by peaceable persuasion to induce others to leave or refrain from working for their employers, if the persuasion is not in the nature of intimidation or coercion and will not thereby render themselves liable to criminal prosecution. *Kemp v. Division No. 241*, 255 Ill. 213; *Beaton v. Tarrant*, 102 Ill. App. 124; 18 Am. & Eng. Encyc. of Law, 87; *Iron Moulders' Union No. 125 v. Allis-Chalmers Co.*, 91 C. C. A. 631, 166 Fed. 45; *Karges Furniture Co. v. Amalgamated Woodworkers Local Union No. 131*, 165 Ind. 421; *American Steel & Wire Co. v. Wire Drawers' & D. M. Union*, 90 Fed. 608; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n*, 59 N. J. Eq. 49; *Reynolds v. Everett*, 144 N. Y. 189. The words to intimidate or to coerce have a well-understood meaning, and the court in undertaking to tell the jury what was "intimidation" was usurping the province of the jury, and in informing the jury that intimidation might include following or spying after a person, if done to prevent his working at a lawful business, was erroneous since that interpretation de-

prives a citizen of the right to argue with and persuade his fellow-employees to quit work although the persuasion might, under the circumstances surrounding it, be peaceable and without a particle of intimidation or coercion in the judgment of an ordinarily reasonable person. Argument and persuasion do not of themselves constitute a criminal offense unless they are designed to intimidate or coerce.

What has been said in reference to the third and fourth instructions given on the part of the People is applicable to the modification of plaintiff in error's second instruction.

The fifth instruction directs a verdict of guilty, if the jury believe the conduct of the plaintiff in error was such as to excite fear or reasonable apprehension of danger on the part of the prosecuting witness and designed to influence him from freely doing what he desired. The jury under this instruction were directed to find the defendant guilty, if they believed from a bare preponderance of the evidence that he was guilty of the offense charged, although they might have had a reasonable doubt of his guilt. A peremptory instruction should include every element requisite to the returning of a verdict as directed. The giving of this instruction was reversible error.

For the reasons indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

Thoele v. Illinois Traction Co., 188 Ill. App. 214.

Frank Thoele, Plaintiff in Error, v. Illinois Traction Company, Defendant in Error.

(Not to be reported in full.)

Error to the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 2, 1914.

Statement of the Case.

Action by Frank Thoele against Illinois Traction Company to recover for personal injuries. The jury returned a verdict for the defendant on which judgment was entered. To reverse the judgment, plaintiff prosecutes a writ of error.

The case was previously before the Appellate Court in 171 Ill. App. 198, in which the court reversed and remanded the case for the reason there was sufficient evidence to require the issues to be submitted to the jury.

JOHN A. FULWILER, JACOB P. LINDLEY and DEMANGE, GILLESPIE & DEMANGE, for plaintiff in error.

LIVINGSTON & BACH, for defendant in error; SIGMUND LIVINGSTON, of counsel.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1506*—*when sustaining objection to question asked of witness on redirect examination harmless.* In a personal injury case sustaining an objection to a question asked of plaintiff on redirect examination as to whether he noticed the object which struck him, *held* not error where the form of the question was changed and the witness fully answered what he saw.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. APPEAL AND ERROR, § 1625*—*when error in rejection of evidence cured.* In a personal injury case, where the court permitted the defendant to ask the court reporter if a certain witness testified on a certain subject at a former trial and refused to permit plaintiff to show by the reporter that the witness was not asked any question on the subject, *held* that any error in the rulings of the court was cured, where it appeared the court afterwards changed its ruling and plaintiff was allowed to read to the jury the entire testimony of the witness at the first trial.

3. APPEAL AND ERROR, § 1241*—*when adversary's instructions cannot be complained of.* The appellant cannot complain of the giving of his adversary's instruction on a legal question involved in his own instruction, where it is not contended that it did not state the law correctly.

4. MASTER AND SERVANT, § 792*—*when instruction on theory of accident proper.* In an action by a servant against his employer for personal injuries, the giving of an instruction which informed the jury that if the injury was the result of an accident the jury should find the defendant not guilty, *held* to state a correct proposition of law and that there was no error in giving it.

**Lincoln F. Mostoller, Appellant, v. Jennie Gove,
Appellee.**

1. EXECUTORS AND ADMINISTRATORS, § 21*—*power of administrator with will annexed.* An administrator with the will annexed has no power to sell real estate by virtue of the will.

2. COURTS, § 94*—*jurisdiction of County Court.* The County Court has no general chancery jurisdiction, and is without jurisdiction where trusts or investments of the estate are involved.

3. COURTS, § 94*—*jurisdiction of County Court to execute a trust.* Since the County Court has no jurisdiction in the management or execution of a trust, it is without jurisdiction to entertain a petition by an administrator with the will annexed to have a certain fund derived from a sale of the real estate invested and the income paid to the widow in lieu of a life annuity provided by the will and an antenuptial contract.

4. APPEAL AND ERROR, § 26*—*jurisdiction of Circuit Court on appeal from County Court.* The Circuit Court on an appeal from the County Court has no greater or other authority or jurisdiction than was vested in the County Court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mostoller v. Gove, 188 Ill. App. 215.

Appeal from the Circuit Court of Tazewell county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1913. Affirmed. Opinion filed July 2, 1914.

Statement by the Court. Lincoln F. Mostoller, administrator with the will annexed of Harvey W. Gove, deceased, filed a petition in the County Court of Tazewell county alleging that on October 29, 1898, Harvey W. Gove, entered into an antenuptial contract with Jennie Cress, in contemplation of a marriage between them, which provided that should the marriage take place Jennie Cress should received annually, so long as she lived the widow of Gove, the sum of \$500, to be paid by the executors or administrators of Gove, which provision is in lieu of dower, widow's award and every claim except homestead in the estate of Gove; that Gove was to provide Jennie Cress with a homestead costing \$2,500, or more, and if she should survive Gove she is to have the use of it during her life, she taking care of it and paying all taxes; that Gove and Jennie Cress were thereafter married and Gove died testate January 13, 1905; that his will was admitted to probate; that it directs the payment of his debts, recites the antenuptial contract and marriage and directs its provisions to be carried out by semiannual payments as specified in the contract, and gives to the widow the use of a horse, furniture, etc., so long as she remains his widow, in addition to the provisions of the contract; that it directs that \$1000 be invested at interest, the proceeds to be used towards paying a pastor's salary, and that \$50 be invested, the proceeds of which annually are to be used in caring for a cemetery lot, and "if the proceeds of my estate each year amount to more than enough to pay the above claims" the balance be turned over to his heirs. The will appointed Jennie Gove and another party executors.

The executors resigned and the petitioner was appointed administrator. The petition recites that the administrator is desirous of closing up the estate and

of paying Jennie Gove a gross sum in lieu of her \$500 annuity, and that petitioner had endeavored to come to an agreement with her for the payment of a gross sum or the purchase of an annuity but had been unable to make any agreement with her.

Jennie Gove answered the petition admitting the antenuptial contract, the making of the will and the death of Gove, and denies that she can be compelled to receive a gross sum in lieu of the provisions of the contract, and insists that the contract and will make her annuity under the contract a lien on the estate, and that under the will only the residue of the income annually remaining after the payment of her annuity is to be divided. The answer states that Lulu G. Mostoller, the wife of the petitioner, is the only heir of the estate, and the only right she has in the estate until the death of defendant is the right to the residue of the income after the annual payments have been made in accordance with the antenuptial contract and said will, and insists that the County Court has no jurisdiction in the matter in controversy.

The County Court made an order that \$15,000 of said estate be set aside to purchase first mortgage bonds to be approved by the court, from the income of which the administrator pay the annuity to Jennie Gove, and the balance of the income therefrom annually to Lulu G. Mostoller during the lifetime and widowhood of Jennie Gove, and at her death or marriage that he pay the principal to Lulu G. Mostoller. Jennie Gove appealed from the order of the County Court to the Circuit Court, where on a hearing the petition was dismissed. The administrator has appealed to this court.

WELTY, STERLING & WHITMORE and W. R. CURRAN,
for appellant.

JESSE BLACK, JR., for appellee.

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MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

The evidence shows that the estate consists of the homestead, worth about \$4,000 which the appellee is in possession of and entitled to as long as she remains the widow of the testator, together with farm lands in Kossuth county, Iowa, of the value of \$16,000, farm land in Livingston county, Missouri, of the value of \$8,000 and about \$2,000 of personal estate which is loaned out by the administrator.

The will gives the executors power to sell and convey real estate necessary to carry out the provisions of the will. An administrator with the will annexed has no power to sell real estate by virtue of the will. *Frackelton v. Masters*, 249 Ill. 33. By the will of the deceased and the antenuptial contract, a trust is created to last during the life or widowhood of Jennie Gove. *Harris v. Ferguy*, 207 Ill. 534; *Ingraham v. Ingraham*, 169 Ill. 470.

The County Court under the Constitution and the statute has jurisdiction in all matters of probate and settlements of estates. While it exercises equitable as well as legal powers in the settlement of estates of deceased persons, yet it exercises only such equitable jurisdiction under equitable rules and principles as is necessary for the allowance of claims of an equitable nature. The County Court has not general chancery jurisdiction and is without jurisdiction where trusts or reinvestments of the estate are involved. It was said in *Re Estate of Mortenson*, 248 Ill. 520: "The settlement of an estate, in legal significance and common understanding, is the process by which letters testamentary or of administration are granted, assets collected, claims allowed, debts paid, real estate sold if necessary for the payment of debts, and the property distributed to those who are entitled to it by the laws of descent or by the will. Such settlement has no relation to the manage-

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ment or execution of trusts, which are either entirely independent of the administration of the estate by the executor or administrator to the same extent that a devise of real estate is independent of such administration, or, if the trust is in the residue of property committed to the executor, can only become operative after the settlement of the estate is completed and the trustee receives the property from the executor. * * *

The supervision and control of trusts, based on the fact that they are created by will, are not embraced within the words '*probate matters.*' "

The prayer of the petition if granted in effect would be a direction to the administrator as a trustee, authorizing a sale of real estate and the investment and reinvestment of the funds in the management of a trust estate under the direction of the County Court. In such matters County Courts have no authority or jurisdiction. *In re Estate of Mortenson, supra; Frackelton v. Masters, supra.*

The Circuit Court on an appeal from the County Court has no greater or other authority or jurisdiction than was vested in the County Court. *Miller v. Miller*, 82 Ill. 463. The County Court, by making the order it made, was undertaking to make a new contract and will for the testator. It did not have any authority or jurisdiction to make the order prayed for, and the Circuit Court did not err in dismissing the petition. The order of the Circuit Court is affirmed.

Affirmed.

Stoutenborough et al. v. Miller, 188 Ill. App. 220.

**J. L. Stoutenborough and Robert Miller, Appellees, v.
Edna Mae Miller, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of De Witt county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed July 2, 1914.

Statement of the Case.

Proceeding begun in the County Court by J. L. Stoutenborough and Robert Miller to have a conservator appointed for Edna Mae Miller on the ground she was feeble-minded and incapable of caring for her property. A trial by jury resulted in a verdict finding defendant feeble-minded. Upon an appeal to the Circuit Court a similar verdict was returned and a judgment was entered that a conservator should be appointed. To reverse the judgment, defendant appeals.

HERRICK & HERRICK, for appellant.

INGHAM & INGHAM, for appellees.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 367*—*when opinions as to mental capacity incompetent.* On the hearing of a petition to have a conservator appointed for defendant on the ground she was feeble-minded and incapable of caring for her property, permitting the petitioners to ask their witnesses after they had testified as to defendant's mental capacity whether they thought she would know and understand the nature of the mortgage for three thousand dollars executed by her upon her land "and other like questions, and permit-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ting them to ask the same questions of defendant's witnesses on cross-examination, *held* improper for the reason the witnesses were not experts, and that though they were competent to give an opinion concerning defendant's mental condition, from what they had seen and observed, they knew nothing about the mortgage except what they had been told, and were no better qualified to give expert opinion with reference to her capacity to understand the mortgage than the jury.

2. EVIDENCE, § 365*—*applicability of rule as to opinion evidence on cross-examination.* The rule concerning the right of lay witnesses to give their opinion is the same whether the questions are asked on direct or cross-examination.

3. INSANE PERSONS, § 5*—*admissibility of evidence.* In a proceeding for the appointment of a conservator, where the issue was whether the defendant was feeble-minded, a note given to defendant by her brother shortly before the trial *held* admissible.

4. INSTRUCTIONS, § 81*—*when objectionable as argumentative.* On the hearing of a petition for the appointment of a conservator, seven instructions given at the request of the petitioners *held* improper as being argumentative in their nature in that they directed the attention of the jury to a note and mortgage given by defendant and told the jury that they should consider them with all the other evidence.

5. INSTRUCTIONS, § 81*—*when objectionable as argumentative.* In a proceeding for the appointment of a conservator, an instruction telling the jury that the proceeding was for the purpose of protecting the estate of defendant, *held* objectionable as argumentative.

Ed. Walther, Appellee, v. Chicago & Alton Railroad Company, Appellant.

1. MASTER AND SERVANT, § 694*—*when evidence sustains recovery for injury resulting from negligent order of foreman.* In an action against a railroad company to recover for personal injuries received by plaintiff in defendant's yards, alleged to have been caused by the negligent order of a foreman in signaling the engineer on a derrick car to "come ahead" while plaintiff was preparing the coupling between the derrick and another car in obedience to said foreman's orders, *held* that a verdict for plaintiff was sustained by the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. WITNESSES, § 337*—*when prior inconsistent statements may be explained on re-examination.* In an action for personal injuries alleged to have resulted from the negligent order of defendant's foreman, where the foreman as a witness testified he gave the order, and for the purpose of impeaching his testimony the defendant showed he made a statement in writing that he did not give the order, *held* it was not error to allow the witness on redirect examination to be asked to explain the statement and whether it was true.

3. WITNESSES, § 338*—*right to examine concerning impeaching evidence.* A party whose witness is impeached by contradictory statements is entitled to show the circumstances under which the statements were made, and the party who impeached the witness by showing such contradictory statements is not entitled to further examine on the question.

4. WITNESSES, § 213*—*when questions asked on cross-examination may be excluded.* Refusal to permit witnesses to be asked on cross-examination concerning their testimony on a former trial for the purpose of impeachment, *held* not error where the questions were either repetitions of questions already answered or were not contradictory of their testimony on the present trial.

5. MASTER AND SERVANT, § 833*—*when refusal to permit questions to be asked as to speed of car harmless.* In an action against a railroad company to recover for personal injuries received by plaintiff while engaged in coupling a derrick car to another car, refusal to permit plaintiff to be asked how fast the derrick could be started and moved, *held* not reversible error where both sides agreed that the car could not be run over one or two miles an hour.

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 2, 1914.

BRACKEN & YOUNG and W. B. LEACH for appellant;
SILAS H. STRAWN, of counsel.

DEMANGE, GILLESPIE & DEMANGE and JESSE E. HOFFMAN, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Plaintiff recovered a verdict and judgment against the defendant for three thousand dollars as damages

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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for personal injuries, from which the defendant prosecutes this appeal. There were two previous trials of this case before a jury. At the first trial the jury disagreed, at the second a verdict was returned against the defendant for two thousand five hundred dollars, on which judgment was rendered. That judgment was reversed by this court for errors of law. *Walther v. Chicago & A. R. Co.*, 176 Ill. App. 399.

The last trial was had on the two counts of the original declaration on which the second trial was had and an additional count. The counts of the declaration on the former trial allege, in substance, that plaintiff was in the employ of defendant as a laborer and a member of the "clean-up" gang in defendant's Bloomington yards; that the men were operating a derrick, which was being used to transfer coal from coal cars to locomotive tenders; that while engaged in that work the derrick remained stationary; that it was equipped with motive power so as to be moved along the track by its own power, and was so used as a switch engine; that the derrick and engineer in charge of it were under the direction of the foreman of the gang; that plaintiff's work was to wave signals to the engineer when to move the derrick boom; that plaintiff was directed by the foreman to prepare the coupling on the derrick for the purpose of using said derrick as a switch engine to move the car on which the gang was working; that in obedience to said order he stepped in front of the derrick, and while in the act of preparing the coupling and in the exercise of ordinary care, without warning to him the foreman negligently signaled the engineer to come ahead, which signal the engineer promptly obeyed and started the derrick, and plaintiff's foot was caught and crushed. One of these counts alleges that the foreman was not a fellow-servant with plaintiff; the other that plaintiff had no experience as a switchman working with moving engines or cars, and did not know of the danger attendant upon using said

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derrick as a switch engine. The additional count pleads with greater detail the facts pleaded in the original counts, and avers that plaintiff did not know and by the exercise of reasonable care, etc., would not have known that said derrick would then and there move while he, the plaintiff, was then and there preparing the said coupling as aforesaid, and that the said foreman knew or by reasonable care should have known that an order directing the said engineer to move said derrick in a southerly direction, while the plaintiff was preparing said coupling, was reasonably liable to directly result in the moving of said derrick towards the plaintiff and in an injury to him.

The evidence shows that plaintiff at the time of the injury was about twenty-six years of age and had been working for several years as a member of a clean-up gang in the Bloomington yards of defendant and that the duties of the clean-up gang were to clean up junk, load and unload material in the shops and coal in the yards under the direction of the foreman. The derrick is a low flat car about nine feet wide and eleven feet long on which were a boiler, engine, windlass, boom and other attachments which make up a derrick. This derrick car can move with its own power very slowly, not to exceed one to two miles an hour, and it was used at times to move cars. The distance from the top of the rail to the under side of the platform of the derrick car is twenty-two inches and to the top of the platform thirty-four inches. The distance from the center of the front wheels to the front of the platform is eighteen inches, so that the front of the wheels is but little back of the front edge of the platform. Plaintiff had frequently worked with the derrick by which he was injured and had acted as foreman in the absence of John Askew, the regular foreman.

On the day of the injury, because of some trouble at the coal chutes, the gang of which plaintiff was a member were loading locomotive tenders with coal from

coal cars with the derrick. The plaintiff had been sent away from the derrick on some errand, and while he was absent a switch engine had bumped into some cars and the derrick, pushing them so as to block another track and it had become necessary to push certain loaded cars further along the track to clear the blockade. The foreman directed the derrick car to be used for that purpose. The plaintiff returned from his errand about that time and the foreman ordered him to get the coupling on the derrick ready to push with the derrick car a coal car which stood a few feet south. The coupling is a flat piece of iron about four feet long, three inches wide and an inch thick, one end of which is fastened to the drawbar, and the other end, when not in use, is swung around and hooked up to the derrick platform. The track where the derrick stood was ballasted with cinders practically level with the top of the rails, both between the rails and outside of them. The plaintiff, on the order of the foreman to get the coupling ready, stepped between the cars, and the derrick car moved towards the coal car catching plaintiff's foot between a wheel and the rail and ran over it so that he lost his foot and leg. The foreman ordered the engineer on the derrick car to come ahead. The evidence tends to show that the foreman had never before given the order to move the derrick before the men arranging the coupling had got it ready and retired to a safe place, and that the signal or direction to the engineer to move the car had always been given by the man working at the coupling. The plaintiff testified that he did not know of and had not heard or seen any order or signal to the engineer to move the derrick, when he undertook to comply with the order of the foreman.

The principal contention of the defendant is that the orders were given to the plaintiff and the engineer at the same time, and that plaintiff heard the order to the engineer to come ahead, and that the plaintiff

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was not in the exercise of ordinary care in stepping between the cars when the engineer had been directed to move the derrick. If the plaintiff did not know of an order or signal to the engineer to start the derrick forward, the plaintiff was very liable to be injured because the ballast and the top of the rail were on a level and the distance back from the front of the car where the space between the wheel and the rail would catch a man's foot, if any part of it should be on the rail or just inside the rail, was but a very few inches. The question of negligence on the part of the defendant and the exercise of ordinary care by the plaintiff were questions of fact concerning which, when all the evidence bearing on the questions is considered, this court would not be justified in interfering with the verdict of the jury. We cannot say the verdict is not sustained by the preponderance of the evidence.

The only other contentions of defendant are that the court erred in the admission and rejection of evidence. The witness Askew, who was defendant's foreman at the time of the injury to appellee, but who was not in the employ of appellant at the time of the trial, made a statement in writing to appellant that he had not given any order to move the derrick at the time of the accident. As a witness for the plaintiff he testified that he did direct the moving of the derrick car. On re-examination by the plaintiff he was asked to explain the statement and whether it was true or not. An objection was overruled and the witness replied he was then working for the Company and didn't care to take any blame on himself. A party whose witness is impeached by contradictory statements is entitled to the circumstances under which the contradictory statement was made, but the party who had impeached the witness by showing contradictory statements was not entitled to further examine on the question. *Atchison, T. & S. F. R. Co. v. Feehan*, 149 Ill. 202; 1 Greenleaf on Evidence, sec. 462.

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Objections were sustained to other questions put to Askew and plaintiff on cross-examination concerning their testimony given on a former trial for the purpose of impeachment. The questions were either repetitions of questions already answered or were not contradictory of their evidence on this trial. The trial court appears to have been liberal in permitting the repetition of questions already answered either in the same or in different forms.

It is also insisted that the court erred in sustaining objections to questions put to plaintiff as to how fast the derrick could be started and moved. Both sides agree that the car could not be run over one or two miles an hour, or faster than a man would walk. While it would not have been error to have overruled the objections it was not reversible error to sustain them. We find no merit in any of the contentions of defendant or reversible error in the case and the judgment is affirmed.

Affirmed.

Oscar Mandel and Albert Schwarzman, Defendants in Error, v. Bloomington and Normal Railway and Light Company, Plaintiff in Error.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLSTON D. MYERS, Judge, presiding. Heard in this court at the April term, 1913. *Affirmed.* Opinion filed July 2, 1914.

Statement of the Case.

Action by Oscar Mandel and Albert Schwarzman against Bloomington and Normal Railway and Light Company to recover damages for injury to a team of

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mules, wagon and harness by being struck by a street car of the defendant at a street intersection. A trial resulted in a verdict for three hundred and fifty dollars against the defendant, on which judgment was rendered. To reverse the judgment, defendant prosecutes a writ of error.

LIVINGSTON & BACH, for plaintiff in error; SIGMUND LIVINGSTON, of counsel.

LIGHT & LIGHT, for defendants in error.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 131*—*when recovery of damages resulting from collision at street intersection sustained by the evidence.* In an action to recover damages for the loss of a team of mules by being struck by a street car at a street intersection, a verdict for plaintiff on conflicting evidence as to the speed the team was being driven and the rate at which the car was running, *held* sustained by the evidence.

2. INSTRUCTIONS, § 17*—*when instruction erroneous as tending to encourage a disagreement of the jury.* Requested instructions containing a statement that: "No juror should consent to a verdict which does not meet with the approval of his own judgment and conscience after due deliberation with his fellow jurors after fairly considering all the evidence admitted by the court and the law as given in the instructions," *held* properly refused as tending to encourage and invite a disagreement.

3. EVIDENCE, § 430*—*when witness not disqualified to give testimony on value.* A witness called to testify as to the value of mules, *held* not disqualified by his testimony that he was not an expert on mules, but knew the value of them.

4. STREET RAILROADS, § 149*—*when requested instruction properly refused.* In an action to recover for the loss of a team of mules by being struck by one of defendant's street cars at a street intersection, a requested instruction which told the jury that it was not material whether a gong was sounded if they believed the driver of the team saw or could have seen, heard or could have

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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heard the car by the use of reasonable care on his part, *held* properly refused for the reason the law does not excuse the failure to sound the gong on the possibility of the traveler seeing or hearing a car in the exercise of due care but only, if in the exercise of ordinary care, he would or must have seen it.

5. APPEAL AND ERROR, § 1538*—*when giving of incomplete instruction not reversible error.* The giving of an instruction which stated: "The jury are the judges of the questions of fact in the case, and the court does not by any instruction given to the jury in this case intend to instruct the jury how they should find any question of fact in this case," *held* not reversible error for the reason it did not state "from the evidence in the case under the instructions of the court," where the jury were fully instructed and the error could not have misled the jury.

In re Estate of William Darley, Deceased.

Objections of A. L. Hamilton et al., Appellees, to Final Report of Benjamin Darley, Administrator, Appellant.

1. INSURANCE, § 837*—*when proceeds of life insurance policy are assets of the estate.* The proceeds of a mutual life insurance policy paid to the administrator of the insured pursuant to the terms of the policy where the beneficiaries named have died before the assured, *held* to become assets of the estate and not to belong to the heirs of the insured.

2. INSURANCE, § 838*—*statute construed as to exemption of proceeds of policy from debts of assured.* Section 25 of the Mutual Assessment Act of 1893, J. & A., § 6573, exempting benefit funds from attachment or other process to pay any debt of a policy holder or beneficiary, is designed to protect the society from legal process by creditors of its members and cannot be construed to exempt the proceeds of a policy from the debts of the assured after they have been paid to the administrator of the assured.

3. TRIAL, § 293*—*when propositions of law may not be submitted.* Propositions of law cannot be presented on an appeal to the Circuit Court from an order of the County Court requiring the proceeds of an insurance policy to be inventoried and distributed as assets belonging to the estate.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appeal from the Circuit Court of Morgan county; the Hon. J. J. COOKE, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 2, 1914. *Certiorari* allowed by Supreme Court.

ED. D. HENRY, for appellant.

WILLIAM N. HAIRGROVE and KIRBY, WILSON & BALDWIN, for appellees.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

William Darley in August, 1907, was a resident of Waverly, Illinois. The Merchants' Life Association of Burlington, Iowa, is a mutual assessment benevolent association, incorporated under the Laws of Iowa to do a life insurance business on the assessment plan, and was authorized to do business in Illinois, and maintained a general agency at Alton, Illinois. In August, 1907, William Darley made application to the Merchants' Life Association for a policy of insurance on his life. He was examined at Waverly, and a policy for \$2,000 was issued on his life payable at his death to Mary Darley, his wife, as beneficiary. The policy was delivered to Darley at Waverly. Mary Darley, his wife, the beneficiary named in the certificate, died, and Mary Darley, his mother, was thereafter designated and made the beneficiary. She also died before the insured. Then, without again designating a beneficiary, the insured died leaving two minor children as his only heirs surviving him. A guardian was appointed and qualified for the children and is now acting as such guardian. William Darley was insolvent at the time of his death. William Darley, the father of the insured, was appointed administrator of the estate of the deceased and collected and receipted for the \$2,000 paid on the policy of insurance. A number of claims were presented in the County Court and allowed against the estate; among these the claim of A. L. Hamilton, based on a judgment rendered against

William Darley in May, 1912, was allowed in the sum of \$4,236.70, and classified as a claim of the seventh class.

The administrator filed a final report in the estate in the County Court, showing that he had received \$2,000 on the policy from the Merchants' Life Association of Burlington, Iowa, and that the estate had no other funds, and stating that the fund received from the policy belonged to Winifred Darley and Carl B. Darley, minor heirs of the insured, and asking for an order from the court that he be directed to pay the proceeds of said policy to the guardian of said children and thereupon be discharged as such administrator. Notice of the hearing on this report was duly given to the creditors and all parties interested in the estate. Hamilton and another creditor of the estate appeared and filed objections to the report denying the right of the heirs to receive the proceeds of the insurance policy, and insisting that the \$2,000 be inventoried and distributed as assets of the estate. The County Court sustained the objections to the report and ordered that the administrator inventory said money and pay the same out as assets of the estate on claims according to their class as provided by the statute. The administrator appealed from the order of the County Court to the Circuit Court where, on a hearing, a similar order was made and the administrator appeals from that order to this court.

The only question involved is whether the money collected on the insurance policy, or certificate, belongs to the children of the assured or is assets of the estate in the hands of the administrator.

The policy on the life of the insured, on which the Merchants' Life Association paid the \$2,000, provides: "In the event of the death of the beneficiary prior to that of the member, or in case none is named, the benefit then to be payable to the legal representatives of the deceased member." "The words 'Legal repre-

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sentatives,' in the commonly accepted sense, mean administrators or executors. What construction shall be given to the phrase 'legal representatives,' depends upon the intention of the party using it. *Warnecke v. Lembca*, 71 Ill. 91. It was competent, under our law, for the intestate to have made the policy payable to his widow or to his heirs, to the exclusion of his creditors; but this he did not do. He chose to make it payable to his 'legal representatives,' and, in this instance, the legal representative of the intestate is his administratrix. Had it been the intention the proceeds of the policy should go to the widow or heirs, to the exclusion of creditors, apt words no doubt would have been used to express that purpose; but no such intention is manifested. The term employed, 'legal representatives,' must be understood in its ordinary meaning, which is, administrators or executors, and cannot, by construction in this case, be held to include the widow, and heirs, to the exclusion of the administratrix." *People for use of Schuchert v. Phelps*, 78 Ill. 147, citing other cases. To the same effect is *Johnson v. Van Epps*, 110 Ill. 552.

The Merchants' Life Association is an Iowa corporation. Section XV of its charter provides: "No certificate of membership or policy shall be issued by this association to any person under the age of eighteen years nor over the age of fifty-five years, nor unless the beneficiary under such certificate shall be the husband, wife, relative, *legal representative*, heir or legatee of such insured member." The Iowa Code, sec. 1789, also provides who may be beneficiaries and names as such, "the husband, wife, relative, legal representative, heir, *creditor* or legatee of the insured member."

Appellant contends that because the policy was issued by a mutual assessment company and the statute of Illinois for the incorporation of such companies (Session Laws 1893, p. 128, sec. 25; Hurd's St. 1913,

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p. 1455, J. & A. ¶ 6573,) provides that the money or benefit rendered by any corporation authorized to do business under this act shall not be liable to attachment nor to be taken by any operation of law to pay any debt of a policy holder or beneficiary, that therefore the proceeds of this policy cannot be used to pay the debts of the assured. It is argued that this section of the statute has not been construed by the courts of this State. The courts have construed section 9 of the Fraternal Insurance Act of 1893, (J. & A. ¶ 6656), the language of which is almost identical with section 25 of the Mutual Assessment Act, and held that this section is only designed to protect the societies from legal process by creditors of their members. *Martin v. Martin*, 187 Ill. 200. The language of the Mutual Assessment Act is not subject to a different construction. There is no reason for giving the language of the policy a construction which would change the clear and usual construction given to the description of the beneficiary of the insured in the policy. That would be making a new contract. We are constrained to hold that the proceeds of the policy are funds in the hands of the administrator to be administered, the same as other assets belonging to the estate.

Propositions of law requested by appellant announcing the law as contended by him were marked refused. This holding is also assigned for error. This is a case where the parties were neither entitled to a trial by jury nor to present propositions of law. *Schofield v. Thomas*, 236 Ill. 417; *Clifford v. Gridley*, 113 Ill. App. 164.

The court, however held the law correctly in deciding the case. The order of the Circuit Court is affirmed.

Affirmed.

Richardson v. Johns, 188 Ill. App. 234.

John Richardson, Appellee, v. W. H. Johns, Appellant.**(Not to be reported in full.)**

Appeal from the Circuit Court of Coles county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 2, 1914.

Statement of the Case.

Action by John Richardson against W. H. Johns on a promissory note for five hundred dollars purporting to be signed by defendant and others. The defendant filed a verified plea denying the execution of the note. A jury returned a verdict finding for plaintiff and a judgment was rendered on the finding. To reverse the judgment, defendant appeals.

CHARLES C. LEE, for appellant.

MARSHALL & SHUEY, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 450***—*when competency of testimony not saved for review.* The competency of a question asked of a witness and his answer thereto are not saved for review where the record shows no objection to the question.

2. **WITNESSES, § 85***—*when witness not incompetent to testify to signature.* In an action on a promissory note where a witness was called to prove defendant's signature on the note and testified that he knew defendant, that he had seen him write his signature and that he knew his signature, and it developed on his cross-examination that he had a note against the defendant which the latter denied making, *held* that the facts developed on cross-examination did not make the witness incompetent to testify to the signature, but only affected his credibility.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Askins v. Hott, 188 Ill. App. 235.

A. W. Askins, Administrator, Appellee, v. Homer Hott et al., Appellants.

1. **INFANTS, § 25***—*authority to stipulate for.* No person has any authority to stipulate in behalf of a minor.

2. **STIPULATIONS, § 2***—*right to stipulate as to jurisdiction.* A stipulation for the hearing of a petition by an administrator to sell real estate to pay debts in the Circuit Court, without a previous hearing in the County Court, *held* to be of doubtful efficacy.

3. **APPEAL AND ERROR, § 1712***—*when unargued assignments of error waived.* An assignment of error relating to the jurisdiction of the trial court may not be considered when such question is not argued.

4. **EXECUTORS AND ADMINISTRATORS, § 380***—*right of heirs to contest validity of allowed claims.* On petition by an administrator to sell real estate to pay claims allowed the estate of a deceased person, the heirs may contest the validity of any claim that has been allowed.

5. **BILLS AND NOTES, § 298***—*when giving of new note in lieu of old one operates as payment.* Evidence *held* to show that the giving of a new note by a husband in lieu of one previously given by the husband and wife constituted payment of the old note, where it appeared the old note was stamped paid, that the new note contained indorsements as to the payment of interest and that the holder had recovered a judgment on the new note and attempted to collect it by execution and creditor's bill.

6. **COSTS, § 77***—*when taxable against creditor of estate.* Where an appeal from an order of the Circuit Court resulted from a wrongful allowance of a claim of a creditor against the estate of a deceased person, and the creditor was made a party to the proceeding, the costs of the appeal may be taxed against the creditor.

Appeal from the Circuit Court of Shelby county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded with directions. Opinion filed July 2, 1914.

Statement by the Court. A. W. Askins, administrator of the estate of Mary Isabelle Hott, deceased, filed a petition in the County Court of Shelby county, on November 16, 1912, for an order to sell real estate to pay debts.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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The petition alleges that Mary Isabelle Hott died at Findlay, Illinois, in December, 1906; that petitioner was appointed administrator of the estate of the deceased July 8, 1908; that the deceased left no personal estate; that claims had been presented and allowed against the estate amounting, without interest, to \$2,458.67 in favor of the First National Bank of Findlay and A. W. Askins, and estimates that the costs of closing up the estate exclusive of attorney's fees will be \$40. It alleges that the deceased was the owner of certain described real estate; that the said deceased left surviving her Homer Hott, her husband, having a dower interest in said real estate, and Eugene Hott, a minor child, the said Eugene Hott being under the age of fourteen years, and that the said Homer Hott had been appointed and had qualified as guardian for said minor, whereof in consideration of the premises petitioner prays that the court may appoint some discreet person as guardian *ad litem* for said minor heir, to appear for and defend his interest.

The petition further represents that the First National Bank of Findlay, Illinois and A. W. Askins are the two creditors whose claims have been filed and allowed, and prays that the court will order and direct your petitioner to sell the real estate according to law, or so much thereof as may be necessary to pay the debts of said intestate, and to make such further order herein as to the court may seem meet.

Summons was issued and served on the Bank, Askins, Homer Hott, Homer Hott guardian of Eugene Hott and Eugene Hott.

Thereafter there was filed in the County Court a stipulation in the following words, omitting the title.

"It is hereby stipulated by and between the parties hereto that in the above entitled matter all files relating to a probate of said claim upon the petition to sell land to pay debts, and all orders entered by the County Court in connection therewith and all files and orders entered in the matter of the estate of Mary Isabelle

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Hott be certified to the Circuit Court of Shelby county, and that said Circuit Court shall have full power to try all questions of law and fact arising in connection with said petition to sell land to pay debts the same as though said cause had been appealed to said court upon an order either allowing or denying said petition.

Executed this 6th day of January, A. D. 1913.

The First National Bank

by Richardson & Whitaker, Attys.,

A. W. Askins,

A. W. Askins, Administrator of the estate of
Mary I. Hott, Deceased.

by Richardson & Whitaker,

T. C. Dove.

We hereby agree to the appointment of T. C. Dove, guardian ad litem.

Richardson & Whitaker.”

On January 7th the County Court entered an order certifying the cause to the Circuit Court for trial upon the issues and directing the clerk to transmit to the Circuit Court the original of all files with a transcript of the record.

Homer Hott made no defense and the petition was taken as confessed against him personally and as guardian of the child. The same counsel signed the stipulation for the bank and the petitioner, although they did not file any answer on the part of the bank, and the petition was taken as confessed by the bank.

T. C. Dove was appointed guardian *ad litem* to defend for Eugene Hott on January 6th, and filed an answer in the County Court, which sets up that the claim allowed in favor of the Bank of Findlay for \$2,361.67 was on a \$2,000 note, on which the deceased was a surety, which had been paid, and sets forth the facts which it alleged constituted the payment. It alleges that the surety was released and that the bank is estopped to claim that the note had not been paid, and that the claim was allowed by collusion between the creditor and the administrator. The answer does not deny that

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the claim allowed in favor of Askins, the administrator, in the sum of \$57, is not just and offers to pay it.

The Circuit Court upon a hearing of the same entered an order that the real estate described, or sufficient thereof to pay the two claims allowed and costs, be sold to pay the same. The minor appeals from that order.

F. R. DOVE and W. C. & T. M. HEADEN, for appellants.

WHITAKER, WARD & PUGH and E. A. RICHARDSON, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

It is assigned for error that the Circuit Court did not have jurisdiction of this cause. No person has any authority to stipulate in behalf of a minor. The stipulation made is peculiar and of doubtful efficacy, for the reason that an appeal would not lie from the County Court to the Circuit Court. Since, however, nor argument is made concerning the question of jurisdiction this court will not express any opinion on that assignment.

The evidence shows that Mary Isabelle Hott died December 18, 1906, leaving surviving, Homer Hott, her husband, and the child, Eugene Hott, who was less than a month old at the mother's death.

The claim of the Bank of Findlay is based on a note for \$2,000 dated February 10, 1906, due six months after date, signed by Homer Hott and Isabelle Hott, the proceeds of which were placed to the credit of Homer Hott, who was a business man in Findlay. The note is stamped across its face, "Paid Aug. 10, '06. 1st Ntl. Bnk." The claim was sworn to by J. E. Dazey, cashier of the bank before C. E. Coventry, who is a notary public and assistant cashier of the bank. Besides this note stamped paid there is attached to the claim what

purports to be a copy of another note of the same date apparently signed by the same makers for \$2,000 due on demand. The bank does not claim that it ever had a note for \$2,000 due on demand against the Hotts. Coventry, who was a witness for the defendant, testified that the cashier of the bank undertook to make a copy of the note that was due in six months, but made a mistake, and the erroneous copy was attached to the claim. Coventry also testified that on August 10, 1906, Homer Hott went to the bank and paid the interest on the note dated February 10, 1906, and executed and delivered to the bank a new note dated August 10, 1906, for the \$2,000 due in six months, and that the original note for \$2,000 was stamped paid and surrendered to Hott. On cross-examination he testified that Hott said his wife would come in and sign the new note, but that she did not do so. All these notes are judgment notes. On March 11, 1908, a judgment by confession against Homer Hott was entered in the office of the Circuit clerk for \$2,270 on the note dated August 10, 1906. The original note of date August 10, 1906, signed by Homer Hott alone, is attached to the declaration and is indorsed, "Feb. 18, 1907, Interest paid to date." "August 28, 1907, interest paid to date." The day after the judgment was entered against Hott in favor of the bank, an execution was issued on it and returned the same day "no property found." On March 13, 1908, a creditor's bill based on this judgment was filed against Homer Hott and Eugene Hott to set aside a deed executed by Homer Hott to his wife, dated September 17, 1906. The grounds for setting aside the deed, which conveys the same property that it is sought to sell to pay the debts, are that the deed was not delivered in the lifetime of Mary Isabelle Hott; that there was no consideration for it and that it was made for the purpose of defrauding creditors. Homer Hott made no defense against the creditor's bill but relatives of the child undertook to defend for

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him. The answer filed by Eugene Hott to the creditor's bill sets up that the land was purchased with the money of Mary Isabelle Hott and that Homer Hott had no interest in the land, but only had the naked legal title, which he had agreed to convey to his wife. The creditor's bill was heard by the court in July, 1908, and a decree was entered dismissing the bill for want of equity.

After the creditor's bill was disposed of, A. W. Askins, who is vice-president of the bank and is the physician who attended Mrs. Hott in her last illness, for which services he has a bill against the estate, was appointed administrator of her estate. The claim of bank against her estate was allowed on the original note dated February 10, 1906, which had been surrendered to Hott, and for which the note dated August 10, 1906, had been given and accepted by the bank and on which it had indorsed interest paid in February and August, 1907, and afterwards entered judgment. It also appears from the evidence that the grandmother of Eugene Hott and the guardian *ad litem*, had offered to pay the claim of Askins for medical services.

When it is sought to sell the real estate of a deceased person the heirs may contest the validity of any claim that has been allowed. The allowance of the claim is only prima facie evidence against the heirs of a debt due from the estate, so far as the realty is concerned. (*Noe v. Moutray*, 170 Ill. 169), and while the giving of one promissory note in lieu of another does not necessarily operate as a payment, the intention or understanding of the parties can be determined either from the express contract of the parties or from the facts and circumstances attending the transaction. *Belleville Sav. Bank v. Bornman*, 124 Ill. 200. Where a subsequent promissory note is given for the same consideration as a former one, it is a question of fact for the determination of the jury whether the former note is thereby satisfied. If the subsequent note was

executed and accepted by the respective parties for that purpose, the satisfaction is complete. *Belleville Sav. Bank v. Bornman*, *supra*; *Morrison v. Smith*, 81 Ill. 221; *Jansen v. Grimshaw*, 125 Ill. 468. The Negotiable Instrument Act of 1907, par. 3, sec. 118 (J. & A. ¶ 7758), also provides that negotiable instruments are discharged, "By the intentional cancellation thereof by the holder."

The evidence shows very clearly that the bank in August, 1906, took a new note signed by Homer Hott, alone, in payment of the note dated February 10, 1906, stamped the latter note as paid and surrendered it to Homer Hott, the principal maker; that the bank treated the old note as paid for two years after its surrender, that it entered judgment on the new note in March, 1908, issued an execution thereon and prosecuted a creditor's bill to a final decree on that judgment, and that that judgment is still in full force and effect against Homer Hott. The evidence shows clearly and conclusively that the note signed by Mary Isabelle Hott was satisfied and paid by the taking of the note signed by Homer Hott, alone, on August 10, 1906. The evidence of Coventry that Hott said his wife would come in and sign the new note is overcome by the facts that he stamped the old note paid, and delivered it to Hott, that a judgment was entered in favor of the bank on the new note, which it still holds uncanceled, and that an unsuccessful attempt was made to collect that judgment by an execution and a creditor's bill.

It was error to decree the real estate of the deceased to be sold to pay the claim of the bank, but it was proper, for a court having jurisdiction of the parties, to order sufficient thereof sold to pay the claim of Askins unless the money to pay that claim and costs should be paid into court. The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion. This appeal having resulted from the wrongful allowance of the claim in fa-

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vor of the bank, and the bank being a party to the proceeding, the costs of this appeal will be taxed against the First National Bank of Findlay.

Reversed and remanded with directions.

Granite City National Bank, v. Annie B. Cross (Appellee), Commonwealth Trust Company (Appellant), Third National Bank, American Trust Company et al.

1. USURY, § 5*—*when note is usurious*. Where a note executed and made payable in Missouri exacted the highest rate of interest allowed in such State, and was given for a loan under an arrangement whereby the payee received bonds of the face value of \$10,000 as a bonus for making the loan, *held* that the exaction of the bonus was a shift or device to evade the law against usury.

2. USURY, § 22*—*what law governs*. A note which is usurious under the laws of the State where it was executed and made payable is usurious in Illinois.

3. USURY, § 75*—*when usury paid may be deducted from principal*. In an action to foreclose a trust deed given on Illinois real estate to secure a note which, under the laws of another State where it was executed and made payable was usurious by reason of exacting the highest rate of interest and an additional bonus, *held* that the court properly applied the value of the usurious bonus and the payments made on the interest in reduction of the principal of the note.

Appeal from the Circuit Court of Jersey county; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 2, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement by the Court. In the early part of 1911, certain officers and bondholders of the Alton, Jacksonville & Peoria Railway Company began negotiations with the Commonwealth Trust Company of St. Louis, hereinafter called the Trust Company, with the object of inducing the Trust Company to purchase a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

block of bonds of the Railway Company. The Trust Company, after an investigation of the affairs of the Railway Company, refused to make the purchase. The negotiations were continued and finally resulted in a proposal in writing made on May 5, 1911, by Annie B. Cross by E. M. Davis, her attorney in fact, E. M. Davis, A. J. Davis and C. H. Segar to the Trust Company stating that the Railway Company had completed and was operating its line from Alton to Godfrey and was constructing an extension to Jerseyville; that the Railway Company had executed a mortgage securing an issue of \$600,000 first mortgage five per cent. bonds; that \$470,000 of said bonds had been issued and sold and \$130,000 of said bonds remained to be issued; that Annie B. Cross and her associates were the holders and owners of a majority of the stock of the Railway Company and of \$100,000 of the bonds issued; that the Railway Company was desirous of selling the \$130,000 of bonds to be issued and needs about \$75,000 for the purpose stated, and we desire to assist it in procuring funds; that if the Trust Company "will purchase from said Railway Company \$83,250 par value of the above described bonds within ten days from the date hereof, at not less than ninety per cent. of their face value, we agree to purchase from you, on your request, such portion of said bonds as you may designate, not to exceed \$73,250 face value, and will pay therefor at the rate of 102.287 per cent. of the face value of bonds so purchased by us; payment therefor to be made within one year from the date of said purchase, * * * with interest thereon at the rate of 8 per cent. per annum, payable monthly. * * * Said note to be secured by the pledge of at least \$140,000 par value of the bonds of said Railway Company."

On May 6, 1911, the Railway Company delivered \$83,250 of said bonds to the Trust Company and the Trust Company paid therefor, at the rate of 90 cents, the sum of \$74,925, which was placed to the credit of

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the Railway Company. On the same day the Trust Company notified Mrs. Cross and her associates that it had purchased the said bonds and had elected to sell \$73,250 par value of said bonds for \$74,925 in accordance with the terms of the proposal and that she was to look to the Railway Company for the interest accrued and to accrue on the bonds. On May 9, 1911, Mrs. Cross and her associates executed and delivered a note dated St. Louis, May 6, 1911, for \$74,925, payable to the Trust Company one year after date with interest at the rate of eight per cent. per annum payable monthly. The \$73,250 of bonds which had been purchased by Mrs. Cross and associates, with enough other bonds of the issue to make up \$140,000 of bonds, were also delivered to the Trust Company as collateral security to the said note. Interest was paid on this note to August 6, 1911, amounting to \$1,498.50.

On September 18, 1911, the Railway Company went into the hands of a receiver. Default was made in the payment of interest on the note, and the collateral bonds were sold on November 4, 1911, for \$50,000, which sum was credited on the note.

On the day the receiver was appointed, Annie B. Cross, to further secure the note to the Trust Company and other creditors who held notes against her, executed and delivered a trust deed on certain real estate in Jersey county to the Illinois State Trust Company of East St. Louis. The trust deed provided that if the notes secured by it were not paid, and more than nine months elapsed, or the property should be sold for taxes, the trustee might proceed to foreclose the trust deed. Default was made in the provisions of the trust deed, and the Granite City National Bank, the holder of one of the notes secured by the trust deed, filed a bill to foreclose it and to procure the appointment of a receiver to take charge of the mortgaged premises. The defendants to the bill either entered their appearance or were served with summons. Mrs.

Cross entered her appearance and filed an answer substantially admitting the allegations of the bill, and a decree of foreclosure was entered, which provided that the question of the rights and interests of the parties to the cause in the funds produced by the sale of the mortgaged premises be reserved for a later decree, and that the cause be again referred to the master to report the proof of the various parties in support of their claims and their right to share in the proceeds with the privilege to any party to present evidence and proof in opposition to any of the claims of the parties to the suit. Thereafter the original counsel for Mrs. Cross withdrew from the case; other counsel appeared for her, and leave was granted her to file an amended answer, which was filed setting up that at the time of the transactions she was not advised of and did not know anything about the nature of the transactions, and that when the trust deed was prepared and executed she was not consulted, and when she executed it she personally knew nothing about the transactions represented by the notes; that all the business had been done by Edgar M. Davis as attorney in fact for her. The answer sets up that in addition to the interest specified in the \$74,925 note there was delivered to the Trust Company \$10,000 of said bonds as a bonus or commission; that the note was executed and made payable in St. Louis, Missouri; that under the laws of Missouri said note is usurious; that chapter 62 of the Revised Statutes of Missouri of 1909 provides that parties may agree in writing for interest at not to exceed eight per cent. per annum; that any person who shall directly or indirectly take more than eight per cent. interest may be sued for any sum paid in excess of the legal rate; that all sums paid in excess of the legal rate shall be credited on the principal debt; that by the law of Missouri, in actions for the enforcement of liens on personal property pledged to secure an indebtedness, if it appear that usurious

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interest has been exacted, such lien, pledge or mortgage shall be void. Exceptions by the Trust Company to the answer of Mrs. Cross were overruled.

On the hearing the court held that the Trust Company had received \$10,000 of the bonds as a bonus or commission for making the \$74,925 loan and that the said note was usurious, and refused to allow any interest and charged the Trust Company with \$3,571.47, the value of the \$10,000 of bonds and all payments made on interest as payments on the principal. The Trust Company appeals from the decree and assigns error on the findings of the court on the question of usury and the crediting of the sum found to be usury and all interest paid on the principal of the debt.

FORDYCE, HOLLIDAY & WHITE and J. V. E. MARSH,
for appellant.

HAMILTON & HAMILTON, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

The only questions raised on this appeal are whether the loan for which the note for \$74,925 was taken was or not usurious, and if it was, then what law applies and governs the remedy in the proceeding to collect the note in this State.

The note was given and made payable in the State of Missouri. The law of the State where the contract is made governs as to whether or not the transaction is usurious. *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Burchard v. Dunbar*, 82 Ill. 450. The statute of Missouri provides that the taking of interest either directly or indirectly at more than eight per cent. per annum is usury.

There is no controversy over the facts. The appellant contends that the transaction was a sale of bonds by the Trust Company to Mrs. Cross and associates.

The Trust Company refused to buy the bonds. Mrs. Cross and her son-in-law, E. M. Davis, were interested in the extension of the railway that issued the bonds. After the Trust Company had refused to buy the bonds, negotiations were continued in reference to procuring a loan with which to continue the railway construction. W. V. Delahunt, the trust officer of the Trust Company, dictated the proposal signed by Mrs. Cross and the reply of the Trust Company to the proposal. The note signed by Mrs. Cross was for the same amount that the Trust Company paid for the \$83,250 of bonds, and the Trust Company transferred \$73,250 of the bonds to Mrs. Cross and took her note for the same amount of money that the Trust Company paid for the \$83,250 of bonds. The Trust Company retained \$10,000 of the bonds as a bonus for making the loan to Mrs. Cross and associates. Mrs. Cross' proposal simply was that the Trust Company should buy the bonds at ninety cents and sell sufficient of them to her at 102.287 per cent to make up the sum the Company paid for the bonds and take the note of Mrs. Cross for the amount paid, drawing eight per cent. interest, and keep the \$10,000 of bonds taken from the Railway Company. Delahunt testified that the Trust Company would not have had anything to do with the bonds except for Mrs. Cross' proposal to take the bonds and leave the Trust Company with the \$10,000 of bonds. The only money that changed hands was the deposit of the amount of the note to the credit of the Railway Company. As was said in *Ferguson v. Sutphen*, 8 Ill. 547 (567): "The law looks at the nature and substance of a transaction, and not to the color or form which the parties in their ingenuity have given it. No imaginable act or contrivance to cover up or conceal the usury will avail the parties. They will not be permitted successfully to evade the provisions of the statute by any conceivable scheme or expedient. The courts will follow them through all their

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shifts and devices, and ascertain the true character and design of the transaction. And if upon such investigation it appears that there was in substance a loan at an illegal rate of interest, no matter what form or shape the contract has been made to assume, it will be declared usurious, and the proper remedy applied."

"The form of the agreement is immaterial, since any shift or device by which illegal interest is arranged to be received or paid is usurious." *Kreibohm v. Yancey*, 154 Mo. 67. The transaction as shown by the undisputed facts was a shift or device to evade the law against usury. The note was usurious under the law of the State where it was made and was payable, and being usurious in Missouri must be held to be usurious in Illinois. *Sherman v. Gassett*, 9 Ill. 521.

The law of the forum governs as to the mode and extent of the remedy. *Burchard v. Dunbar, supra*; *McCoy v. Griswold*, 114 Ill. App. 556. The statute of this State provides that where a contract is usurious only the principal sum shall be recoverable. It is also the rule in this State that where a note is usurious all payments made on interest on the note will be applied on the principal. *Woolley v. Alexander*, 99 Ill. 188; *Cobe v. Guyer*, 237 Ill. 568. The trial court correctly applied the value of the usurious bonus and the payments made on the interest in reduction of the principal of the note. There is no error in the case and the decree is affirmed.

Affirmed.

George E. Luce, Appellee, v. E. P. Armstrong, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 2, 1914.

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Statement of the Case.

Action by George E. Luce against E. P. Armstrong to recover a balance claimed to be due for some hay shipped by plaintiff from Hope, North Dakota, to defendant at Bloomington, Illinois. The suit was originally brought before a justice of the peace, where plaintiff had judgment, and on appeal to the Circuit Court the jury returned a verdict for plaintiff for \$151.75. To reverse the judgment rendered on the verdict defendant appeals.

MURRAY & MORRISSEY, for appellant.

WALKER R. FLINT, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 990*—*when ruling on motion not presented for review.* A ruling on a motion to suppress depositions is not presented for review, where the bill does not contain any such motion or exception to the ruling thereon; that the motion and ruling thereon are in the record and the clerk has written an exception to the ruling does not save the question for review.

2. APPEAL AND ERROR, § 788*—*necessity of bill of exceptions.* A bill of exceptions is necessary to present for review rulings on motions and anything outside of the proper common-law record.

3. SALES, § 65*—*contract construed as to place of weighing and grading.* Where a buyer made a proposition under which hay was sold to him to pay a certain price per ton for timothy "your track," held that the hay when placed on the cars at the place of shipment was delivered to the buyer there, and any difference between the weight of the hay at the place of shipment and destination was at the risk of the buyer and that he could not insist that he bought the hay to be weighed and graded according to custom at destination.

4. SALES, § 330*—*when instruction not misleading.* In an action for the price of a shipment of hay, where the proposition of defendant under which the hay was sold to him was to pay a certain

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sum per ton for timothy "your track," the giving of an instruction omitting the word "timothy" in describing the hay, and using the letters "F.O.B." instead of the words "your track," *held* not misleading.

The People of the Village of Moweaqua for use of I. H. Johnson, Appellees, v. W. A. Morgan et al., Appellants.

1. APPEAL AND ERROR, § 1431*—*when refusal to require security for costs harmless.* Refusal of court to require a plaintiff to file security for costs, *held* harmless where the judgment was rendered in his favor.

2. OFFICIAL BONDS, § 19*—*liability on village marshal's bond.* A person unlawfully arrested and beaten by a village marshal may recover on the latter's official bond given under section 75, ch. 24, Hurd's R. S., J. & A. ¶ 1347, where the act was done in his official capacity by virtue of his office.

Appeal from the Circuit Court of Shelby county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 2, 1914.

CHAFEE & CHEW, S. S. CLAPPER and GEORGE B. RHOADS, for appellants.

GEORGE T. WALLACE, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

This is a suit in debt against the principal and sureties of the bond given by W. A. Morgan as night policeman of the Village of Moweaqua for the use of I. H. Johnson, and it is alleged in the declaration that on the night of November 12, 1909, Morgan, as such policeman under color and by virtue of said office, did unlawfully and without reasonable or proper cause

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

and without warrant arrest said Johnson forcibly and unlawfully, took him to the jail of said Village and incarcerated him therein, and without any reasonable cause or provocation brutally, maliciously and unlawfully struck and beat him with a club and broke the large bone of his right leg. The penalty of the bond was five hundred dollars. The jury returned a verdict assessing damages in the sum of \$250, on which verdict judgment was rendered; to reverse which this appeal is prosecuted.

It is first urged that the trial court erred in refusing to require the beneficiary plaintiff to file security for costs. If there was any error in said action it worked no injury to the defendants, as judgment has been rendered in favor of the plaintiff. *Beal v. Pratt*, 67 Ill. App. 483.

It is next contended that no recovery can be had on the bond of the village marshal by a third person as beneficiary plaintiff for acts of this character because the statute does not specifically prescribe such liabilities. Section 75 of chapter 24, Hurd's R. S. (J. & A. ¶ 1347), provides: "All officers of any city or village, whether elected or appointed, shall, before entering upon the duties of their respective offices, take and subscribe the following oath or affirmation:
* * * And all such officers, except aldermen and trustees, shall, before entering upon the duties of their respective offices, execute a bond with security, to be approved by the city council or board of trustees, payable to the city or village, in such penal sum as may, by resolution or ordinance, be directed, conditioned for the faithful performance of the duties of the office and the payment of all moneys received by such officer, according to law and the ordinances of said city or village."

Official acts in the performance of the duties of an office do not mean simply the lawful acts of the officer holding that office, but include all acts done in his

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official capacity under color and by virtue of said office. *Campbell v. People*, 154 Ill. 595. The object of requiring official bonds is to obtain indemnity against the use of an official position for wrongful acts done under color of the office. *Greenberg v. People*, 225 Ill. 174. The bond of a city treasurer is governed by the above section of the statute, which includes all city and village officers, and in the case of *City of East St. Louis v. Flannigan*, 26 Ill. App. 449, it was held that the sureties of the treasurer's bond were liable to a third person damaged through the unlawful acts of the treasurer done in his official capacity by virtue of his office. The same rule must be applied to the case of a village marshal.

There was no harmful error in the giving or refusing of the instructions, and as the evidence tends fairly to support the verdict, the judgment is affirmed.

Affirmed.

Emma F. Dickinson et al., Appellants, v. Franklin W. Ridgely, Executor et al., Appellees.

1. DESCENT AND DISTRIBUTION, § 9*—*what law governs.* The right of succession to the personal estate of a deceased person, whether he leaves a will or dies intestate, depends on the law of his domicile.

2. WILLS, § 224*—*law governing construction as to right of succession to personal estate.* The construction of a will as to the right of succession to personal property must be determined according to the law of the State in which the testator was domiciled at the time of his death.

3. WILLS, § 495*—*when lapsed legacies do not fall in residuum.* Though as a general rule lapsed legacies will sink into the residuum where there is a general residuary clause sufficient to embrace it in its terms, there is an exception to the rule in cases where the testator gives legacies to the same persons who are provided for under the residuary clause.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. **WILLS, § 494***—*when lapsed legacies become intestate property.* Where a will gave legacies to the same persons who were made beneficiaries under the residuary clause and the residuary clause provided for a distribution of the residue of the estate and lapsed legacies and one of the legatees died before the testatrix, *held* that the legacy and also the residuary legacy of such deceased legatee lapsed and became intestate property.

5. **JUDGMENT, § 576***—*conclusiveness of foreign judgments.* Foreign judgments are conclusive in this State only when the proceedings in which they were rendered show that the court had jurisdiction of both the subject-matter and the parties.

6. **JUDGMENT, § 577***—*right of courts of this State to inquire into jurisdiction of court entering foreign judgment.* Courts of this State may inquire into the proceedings, judgments and decrees of a court of another State to determine if that court had jurisdiction of the subject-matter and of the parties.

7. **EXECUTORS AND ADMINISTRATORS, § 564***—*law governing distribution on ancillary administration.* The distribution of personal assets in the hands of an ancillary administrator or executor must be made according to the laws of the decedent's domicile.

8. **JUDGMENT, § 577***—*when foreign judgment void for want of jurisdiction to make it.* Where the Probate Court in another State on an ancillary administration of an estate of a decedent, who was a resident of this State made an order of distribution contrary to the laws of succession in this State, *held* that it acted without authority and that the order was not conclusive on the courts in this State.

9. **JUDGMENT, § 577***—*when foreign judgment void and not conclusive for failure of record to show jurisdiction of parties.* An order of distribution by a Probate Court of another State made on an ancillary administration, *held* void and not conclusive on the courts of this State for the reason that the record did not show service of notice upon the persons interested in the estate.

10. **EXECUTORS AND ADMINISTRATORS, § 563***—*nature of ancillary administration.* An ancillary administration is but auxiliary to the principal administration and is subordinate thereto.

11. **EXECUTORS AND ADMINISTRATORS, § 583***—*when erroneous distribution on ancillary administration may be corrected on final distribution of principal estate.* Where on an ancillary administration the Probate Court of another state makes an order of distribution of the personal estate whereby the distributees receive a larger share than they are entitled to, such error in the distribution may be corrected on the final distribution of the principal estate by requiring such distributees to account for the excess over their proper

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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shares, where the executor of the principal estate has made no distribution and has sufficient funds in his hands to rectify the error.

Appeal from the Circuit Court of Menard county; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded with directions. Opinion filed July 2, 1914. *Certiorari* allowed by Supreme Court.

JULIAN H. HALL and SMOOT & LANING, for appellants.

WATKINS & GOLDEN and J. C. HAMMOND, for appellees.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

This is a bill in chancery to construe the third and fifth clauses of the will of Elizabeth S. Lee, deceased. The will was executed April 14, 1909. The first clause directs that all the debts of the testatrix be paid, the second provides for a number of specific legacies, the fourth devises the home of the testatrix and the sixth appoints Franklin Ridgely executor of the will. The third and fifth clauses are as follows:

“Third. I give and bequeath all my money on deposit in the savings banks in the State of Massachusetts, together with the savings bank books representing such deposits, one-half to my brother, Calvin S. Loomis, of Whately, Massachusetts, the other half to be equally divided between the children of my deceased sister, Sarah A. Belden, late of Hatfield, Massachusetts, the descendants of a deceased child to take the parent’s share, and I appoint my nephew, Daniel W. Wells, as ancillary executor of this will in the State of Massachusetts.”

“Fifth. All the rest and residue of my estate, both real and personal, and any lapsed legacies, I give, devise and bequeath as follows: One equal part thereof to my brother, Calvin S. Loomis of Whately, Massa-

chusetts, or in case of his death to his descendants, according to the laws of descent of the State of Illinois; and the other one equal part thereof to be divided equally among the children of my deceased sister, said Sarah A. Belden, the descendants of a deceased child to take the parental share.”

Elizabeth S. Lee, the testatrix, was a resident of Athens, Menard county, Illinois, and died October 28, 1911, at said place. She left an estate of about \$60,000, which consisted chiefly of personal property; \$20,000 of this amount was money on deposit in savings banks in the State of Massachusetts and the balance of the property was situated in the State of Illinois. Franklin W. Ridgely qualified as the executor of her will in Illinois and Daniel W. Wells as ancillary executor in Massachusetts, and both are now acting as such executors.

Testatrix left no descendants, brothers or sisters, father or mother, but left surviving her as her only heirs at law numerous nephews and nieces, who were children of deceased brothers and sisters. At the time the will was made she had one brother living, Calvin S. Loomis, who died on April 10, 1911, over six months prior to the death of the testatrix.

On August 24, 1912, the said Daniel W. Wells, ancillary executor, filed his petition in the Probate Court of Hampshire county, Massachusetts, stating that there was a balance in his hands to be distributed and that three-fourths of said balance was to be distributed according to the will; that Calvin S. Loomis having died in the lifetime of the testatrix, leaving no descendants, one-fourth of the net estate was intestate estate; that by the third clause of said will one-half of the property in Massachusetts was bequeathed to be divided equally between the children of Sarah A. Belden; that by the fifth clause of the will another share, to wit, one-fourth of the estate in his hands, was in like manner to be divided equally among the children of Sarah

A. Belden, and that the last and remaining one-fourth was intestate estate, and other persons were heirs beside the children of said Sarah A. Belden; that petitioner had upwards of \$18,000 in his hands and that \$2,000 was sufficient reserve for debts and expenses; that \$12,000 could properly be distributed to the children and descendants of Sarah A. Belden, and praying for distribution of said amount. Franklin Ridgely, the Illinois executor, filed his objection to the granting of said petition on the ground, among others, that the legacies of Calvin S. Loomis having lapsed, the succession to the property embraced therein should be determined by the laws of the State of Illinois; that a large part of the lapsed legacies became intestate property and that the persons entitled thereto were not residents of Massachusetts, and that the efficient and economical administration of the estate required that after the payment of the debts of the testatrix the balance should be turned over to him to be distributed in accordance with the laws of the State of Illinois. His objections were overruled and a distribution ordered in accordance with the prayer of the petition. None of the complainants, appellants here, appeared at said hearing and no appeal was taken from the order of said court.

The bill avers that the distribution of the Massachusetts estate was wrongfully made; that \$4,000 of the money distributed under the order of the Probate Court of Hampshire county to the descendants of Sarah A. Belden as testate property bequeathed to them by clause 5 is not testate property, but, on the contrary, is intestate property and should be distributed to the heirs at law of Elizabeth S. Lee; that Franklin Ridgely, executor, has \$40,000 in his possession; that complainants have requested him to pay to them out of the money in his hands for distribution such sums, respectively, as they have been deprived of by the wrongful distribution made by said Wells, but

said Ridgely has refused so to do; that there is a dispute as to how the said funds bequeathed to Calvin S. Loomis by clause 3 in said will should be distributed; prays for the construction of said will in so far as the same is sought to be construed, and that the respective rights of the complainants in and to the lapsed legacies may be determined; that said Ridgely be directed to pay complainants out of the fund belonging to the estate of Elizabeth S. Lee such sums as may be found necessary in order that complainants may receive their respective shares of said lapsed legacies.

The answer of the Belden children avers that the distribution of the Massachusetts property was correct and that the Probate Court of Massachusetts having determined the proper distribution of the property in that State that the same cannot be reversed by the courts of this State. The answer of Franklin W. Ridgely, executor, admits there is a dispute as to how said fund bequeathed to said Calvin S. Loomis should be distributed and prays for direction and instruction of the court. The answer of Daniel W. Wells, ancillary executor, avers that the Probate Court of Hampshire county, Massachusetts, had exclusive jurisdiction and control of his actions in the premises and of the fund in his possession, and the Circuit Court of Menard county has no jurisdiction in regard to the matter. Complainants filed replications to the answers.

On the hearing, the decree of the Circuit Court found that both the specific and residuary legacies to Calvin S. Loomis lapsed and became intestate estate, but that the Probate Court of Hampshire county, Massachusetts, had power to make a distribution of the assets in that State, and that all parties in interest had due notice of said proceeding in said court, and that said order was an appealable order under the laws of Massachusetts; that the Illinois executor appeared and took part therein, and did not appeal from said order; that by virtue of the portion of the Federal constitu-

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tion, which declares that full faith and credit shall be given in each State to the judicial proceedings of every other State, the order of the Massachusetts court is binding upon the Circuit Court, and that its construction of the law, so far as the same relates to the distribution of the Massachusetts funds, cannot be questioned by the courts of this State. It then decrees a distribution in accordance with said findings.

Appellants assigned error to that part of the decree holding that the Circuit Court of Menard county was bound by the order of distribution of the Probate Court of Hampshire county, Massachusetts, and in refusing to decree that their respective share in the Massachusetts funds be made up to them out of the funds in the hands of the Illinois executor.

Appellees have filed cross-errors to that part of the decree finding that both the specific and residuary legacies lapsed and became intestate estate of Elizabeth S. Lee, and to the distribution of the lapsed legacy under the fifth clause of the will as intestate estate.

The situs of personal property is the domicile of the owner, and on the death of the owner the law governing its distribution is that of his domicile at the time of his death. *Cooper v. Beers*, 143 Ill. 25; *Davis v. Upson*, 230 Ill. 327. The right of succession to the personal estate of a deceased person, whether he leaves a will or dies intestate, depends upon the law of his domicile. *Rackemann v. Taylor*, 204 Mass. 394; *Osburn v. McCartney*, 121 Ill. 408. There can be no controversy over the proposition that the construction of this will as to the rights of succession to the personal property bequeathed under the third and fifth clauses thereof must be determined according to the law of this State, the domicile of the testatrix at the time of her death.

By the third clause the testatrix bequeathed one-half of the money on deposit in the banks of Massachusetts to her brother, Calvin S. Loomis, and the

other half to the children of a deceased sister, Sarah A. Belden. By the death of Loomis before the death of the testatrix his legacy under this clause lapsed. The fifth or residuary clause bequeaths one-half of all the rest and residue of the estate, and any lapsed legacies, to said Loomis or his descendants, and the other half thereof to the said children of Sarah A. Belden, or their descendants. This residuary legacy to Loomis also lapsed. It will be noticed that the legatees under the residuary clause are the same legatees named in the third clause. In determining the rights to the succession of the property included in these lapsed legacies it is necessary to consider the third and fifth clauses in connection with each other.

The general rule is well settled in this State that if a legacy lapses, and there is a general residuary clause sufficient to embrace it in its terms, it will sink into the residuum, and all lapsed legacies of personal property go into a general residuary fund. *Crawford v. Mound Grove Cemetery Ass'n*, 218 Ill. 399; *Dorsey v. Dodson*, 203 Ill. 32; *Mills v. Newberry*, 112 Ill. 123. To this general rule, however, there is an exception in cases where the testator gives legacies to the same persons who are provided for under the residuary clause, in which event the lapsed legacy does not fall into the residuum because it would in effect be construing that the intention of the testator was to bequeath to one who died a portion of the residue happening in consequence of his own death.

In the case of *Dorsey v. Dodson*, *supra*, the will there under consideration gave a specific legacy of \$5,000 to Henrietta Dorsey. By the nineteenth section of that will the executor was directed to sell the residue of the real estate and turn over the proceeds to John J. Green, Henrietta Dorsey and Fanny Knapp, to be equally divided between them, share and share alike. The twentieth clause gave all the residue of the personal estate to said John J. Green, Henrietta

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Dorsey and Fanny Knapp. Henrietta Dorsey died in the lifetime of the testator. The facts in that case in all substantial respects are similar to those in the case at bar. The Supreme Court in deciding the effect of the lapsing of the legacies to Henrietta Dorsey, said: "The other question in the case relates to the legacy of \$5,000 to Henrietta Dorsey. The general rule is, that if a legacy lapses, and there is a general residuary clause sufficient to embrace it in its terms, it will sink into the residuum. This is based entirely upon the presumed intention of the testator that the residuary clause shall include everything not effectually devised or disposed of. Upon the failure of a particular intent to give a legacy to some person the courts give effect to the general intent manifested by the residuary clause, presuming that the testator prefers the residuary legatee to every one except the particular legatee. But where a testator gives legacies to several persons and then provides for a division of the residue between the same persons the rule and the reason for it fail. The rule in such case is stated in Schouler on Wills (3d Ed. sec. 519) as follows: 'Where legacies are given to several legatees and the residue is bequeathed to the same legatees, it follows that the residue will not include a lapsed legacy to one of them.' To hold, in such a case, that the testator intended the lapsed legacy to fall into the residuum, was said in *Craighead v. Given*, 10 S. & R. 351, to hold that the testator intended to bequeath to one who died a portion of the residue happening in consequence of his own death—a construction which could never be supported. Where a testator gives specific legacies to several legatees and gives the residue to them as tenants in common, if each one receives his share of the residue over and above the specific legacies he receives exactly what the testator intended to give him. Having given to each specific sums and a specific share of the excess over the total of such sums, the proportion of those

who live is not to be enlarged by a lapsed legacy. It is not to be inferred that the testator intended that a lapsed legacy to one should fall into the residue, so that the survivors should receive a different and increased proportion of the testator's estate. (*Green v. Pertwee*, 5 Hare, 248; *Silcox v. Nelson*, 24 Ga. 84; *Lombard v. Boyden*, 5 Allen, 249; *Lloyd v. Lloyd*, 4 Beav. 231.) Not only did the specific legacy to Henrietta Dorsey lapse, but her share of the residuary estate also lapsed, and to carry the lapsed legacy to her forward into the residuum would be to add one-third of it to another lapsed legacy to her and augment the shares of Fanny Knapp and the estate of John J. Green with the remaining two-thirds, contrary to the rule of law in such cases. It will be seen that the same rule would apply as to the share of Henrietta Dorsey in the proceeds of the real estate under the nineteenth clause, and for the same reason it could not go into the residue. The testator gave the proceeds to her and her brother and sister in equal shares, and could not have intended, in case of her death, that her share should pass to her and the same brother and sister under the twentieth clause. The provisions of the will for Henrietta Dorsey all lapsed, and under its terms became intestate estate, to be distributed, as such, under the Statute of Descent." The rule announced in the above case was approved and followed in *Crawford v. Mound Grove Cemetery Ass'n*, *supra*.

The controlling principle announced in these cases is that the law will never hold that a testator intended to bequeath to one who died a portion of the residue happening in consequence of his own death. But it is submitted by counsel for appellee that the words in the residuary clause, "and any lapsed legacies," distinguished this case from those above cited. To this proposition we cannot agree. These words give no other or different meaning to this clause than that which the law itself would give if they had not been

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used. They add no force to the intention of the testatrix, nor do they make it more certain, nor can they have any effect in changing the reason for the rule as announced in said cases. It is apparent, therefore, that the lapsed legacy to Loomis under the third clause became intestate property to be distributed according to the laws of descent of this State and did not descend into the residuary clause. The residuary legacy to Loomis under the fifth clause also lapsed and became intestate property to be distributed according to the laws of descent of this State. It follows that the construction of the effect of these lapsed legacies by the chancellor in the decree was correct.

It remains to be considered whether it was error in the decree to hold that the order of distribution entered in the ancillary estate in Massachusetts by the Probate Court of Hampshire county is conclusive on the courts of this State, by virtue of section 1, art. IV, of the Constitution of the United States, which provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. Foreign judgments are only conclusive in this State when the proceedings in the cases in which the judgments are rendered show that the courts which rendered them had jurisdiction of both the subject-matter and the parties. *Zepp v. Hager*, 70 Ill. 223; *Tucker v. People*, 122 Ill. 583. Since the case of *Thompson v. Whitman*, 18 Wall. 457, the Supreme Court of the United States has repeatedly held that the record of a judgment rendered in another State might be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be annulled, notwithstanding it may recite that they did exist; that want of jurisdiction may be shown either as to the subject-matter or the person. *Simmons v. Saul*, 138 U. S. 439; *Reynolds v. Stockton*, 140 U. S. 254; *National Exchange Bank of Tiffin v. Wiley*, 195 U. S. 257;

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and the same rule obtains in Massachusetts, *Gilman v. Gilman*, 126 Mass. 26. Courts of this State may inquire into the proceedings, judgments and decrees of a court of another State to determine if that court had jurisdiction in the subject-matter and of the parties, and the judgments and decrees rendered by a court without such jurisdiction are void, and have no binding effect upon the party aggrieved. *Field v. Field*, 215 Ill. 496; *Forsyth v. Barnes*, 228 Ill. 326; *Forrest v. Fey*, 218 Ill. 165.

As a general proposition, the law is that the distribution of personal assets in the hands of an ancillary administrator or executor must be made according to the laws of the decedent's domicile. 13 A. & E. Encyc. of Law, page 940. And this is the rule not only in this State, but in the State of Massachusetts. *Rackemann v. Taylor*, 204 Mass. 394; *Osburn v. McCartney*, 121 Ill. 408. Section 1 of chapter 143 of the Revised Laws of Massachusetts provides that in the ancillary administration of the estates of persons who are residents of other States, the estate found there, after the payment of the debts, shall be disposed of according to the last will, if he left any; otherwise, his real property shall descend according to the laws of Massachusetts, and his personal property shall be distributed and disposed of according to the laws of the State of which he was a resident. Section 2 of said Act provides that distribution may be made by the ancillary executor of that State, or in the discretion of the court the estate may be transmitted to the executor or administrator in the State of which the deceased was an inhabitant, to be there disposed of according to the laws thereof. In the construction of this statute by the Supreme Court of Massachusetts, that court held in the case of *Rackemann v. Taylor*, *supra*: "Every part of the chapter recognized the law of the domicile of the deceased person as controlling in all matters pertaining to the succession to his property.

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If the Probate Court should assume to distribute and dispose of the personal estate according to his last will, and if there was a question of construction of the will upon which the courts of the different States differed, the Probate Court would be bound by the construction of the courts in the State of his domicile."

And it further held: "It is a familiar rule of law that the right of succession to the estate of a deceased person, whether he leaves a will or dies intestate, depends upon the law of his domicile. The settlement of his estate and the disposition of his property are to be made in accordance with the law of that place.

* * * But such probate of a will or such administration of an intestate estate is always nearly ancillary. It is not for the purpose of establishing rights of succession, whether under a will or otherwise. Those are to be established in the courts of the State or country where the deceased person had his domicile."

The Probate Court of Hampshire county had jurisdiction to make a distribution, but when it proceeded to make a distribution contrary to the laws of succession of this State it acted without authority, and its order making such distribution is not conclusive upon the courts of this State.

By section 21 of chapter 141 of the Revised Laws of Massachusetts it is provided that if the Probate Court finds that a partial distribution of the personal property of an estate can without detriment be made to the persons thereto, it may, subject to the rights of creditors and *after notice*, order such partial distribution to be made. We do not find from an examination of the laws introduced in evidence that there is any provision as to what such notice shall consist of, or how it shall be made. The record of the proceedings of said Probate Court show an order was entered citing all persons interested to show cause on the fifth day of November, A. D. 1912, why said application of the ancillary administrator for distribution should not

be allowed, and further ordered that said administrator serve said citation by publishing the same, once in each week, for three consecutive weeks in a certain newspaper and *by mailing post paid a copy thereof to each person interested* in the estate fourteen days before said date. The proof of service of this citation is as follows: "I have served the foregoing citation as therein ordered by publication in Daily Hampshire Gazette, Sept. 3, 9 and 16, and by mailing post paid a copy thereof to each and every one of the persons interested in said estate. Sept. 4, 1912. (Signed) John C. Hammond." This is sworn to by said Hammond. Who said Hammond is does not appear. The persons to whom the citation was mailed do not appear, nor does it appear who the persons were that said Hammond considered interested in the estate. It must be conceded that there should be proof at least that the order of the court directing notice had been complied with. Even though publication was made in the newspaper, if process was not served or notice given as required by the order, the court did not acquire jurisdiction of the parties and the order of distribution was void. *Goudy v. Hall*, 30 Ill. 109; *Forrest v. Fey*, 218 Ill. 165. The affidavit of said Hammond was wholly insufficient to prove service of said citation. While the order of distribution itself states: "All persons interested in the matter of said petition having had *due notice* of said petition, etc.," this cannot cure the defective service where the record itself does not show that notice was given as required by law. Jurisdiction does not attach where it is shown that the facts upon which the court acted were insufficient to support the finding of jurisdiction, and the recital on the face of the order that due notice was given makes no difference. *Whitney v. Porter*, 23 Ill. 445; *Hemmer v. Wolfer*, 124 Ill. 435; *Forrest v. Fey*, *supra*. While it is true that the Illinois executor appeared and objected to the entering of the order of distribution yet he, by so doing, could not confer jurisdiction on said Probate

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Court over the persons interested in the estate. He was not a beneficiary under the will, nor had any interest thereunder except to faithfully discharge the duties of his trust as executor. No action of his could submit the persons of appellants to the jurisdiction of that court. The proof of service of the citation was insufficient to give said court jurisdiction of the persons of appellants.

But even if the facts established the jurisdiction of said Probate Court over the persons of appellants, the order of said court was but an error of law, and ancillary administration is but auxiliary to the principal administration and is subordinate thereto. 1 Bouvier Law Dict. The estate of the testatrix was an entity; she did not leave two estates. An error made in the distribution of personal assets in an ancillary administration can be corrected in the distribution of the principal estate. Appellees having received a larger share than they were entitled to by the order of distribution made by the Probate Court of Massachusetts, in equity and good conscience should be required to account for the excess over their proper shares in the final distribution of the principal estate. The executor of the principal estate has made no distribution and has sufficient funds in his hands to rectify the error made, and we can see no good reason why the court should not order this to be done, so as to give to each party interested that portion of the entire estate to which he is entitled. *Ramsay v. Ramsay*, 196 Ill. 179.

The decree of the Circuit Court must therefore be reversed and the cause remanded with directions to enter a decree in conformity with the views herein expressed.

Reversed and remanded with directions.

Danskin v. Denny et al., 188 Ill. App. 267.

S. J. Danskin, Administrator, Appellant, v. Margaret A. Denny and John J. Denny, Appellees.

(Not to be reported in full.)

Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 2, 1914.

Statement of the Case.

Action by S. J. Danskin, administrator with the will annexed of Karl D. Danskin, deceased, against Margaret A. Denny and John J. Denny, on a promissory note for the principal sum of thirty-three hundred dollars, dated at Hillsboro, N. D., purporting to be executed by defendants and made payable to Brown-Danskin Company. Plaintiff sues as administrator of the assignee of the note. Defendants filed several pleas including the general issue, with an affidavit denying the execution of the note. The jury returned a verdict in favor of defendants and judgment was rendered on the verdict. To reverse the judgment, plaintiff appeals.

B. O. WILLARD, W. ST. J. WINES and CLAYTON J. BARBER, for appellant.

E. L. CHAPIN, for appellees.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

BILLS AND NOTES, § 441*—*when finding as to execution sustained by the evidence.* In an action on a promissory note where pleas were filed, with an affidavit denying the execution of the note, held that a verdict for defendant on conflicting evidence as to the execution of the note would not be disturbed on the ground that the clear preponderance of the evidence showed that defendants signed the note.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Curran v. Southgate, 188 Ill. App. 268.

W. R. Curran, Trustee, et al., Appellees, v. Ella E. Southgate et al., Appellants.

1. **MORTGAGES, § 587***—*when rule requiring sale in inverse order of alienation inapplicable.* The rule requiring a sale of mortgaged premises in the inverse order of alienation does not apply where the deed of the mortgagor conveying the first parcel of the mortgaged premises recited that the land was sold subject to the mortgage, which the grantee "agrees to pay as a part of the purchase price," and the person seeking to invoke the rule had taken from a subsequent grantee a mortgage on such parcel with notice that it was charged with the payment of the whole of the mortgage.

2. **APPEAL AND ERROR, § 972***—*when objections to master's findings not saved for review.* Objections to the findings of a master cannot be raised on appeal where no objection or exception was taken to the master's report.

THOMPSON, P. J., took no part in the consideration of this case.

Appeal from the Circuit Court of Fulton county; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 2, 1914.

HARVEY H. ATHERTON, for appellants.

EVANS & EVANS, for appellees.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

On May 3, 1913, W. R. Curran, trustee, filed his bill in the Circuit Court of Fulton county for the foreclosing of a trust deed on about 700 acres of land in said county, as described in the bill. The trust deed was given by W. A. Phillips, who was then the owner of the 700 acres, on February 19, 1910, to W. R. Curran, trustee, for the legal holder of notes, for the sum of \$16,000, due five years after date with interest at six per cent. per annum. There is no dispute as to this trust deed being a valid prior lien on all the 700 acres, or of the amount due thereon, or of the right

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number

of the original complainants to foreclosure of the same. The contest is as to what part of the land should be sold first.

November 26, 1910, W. A. Phillips sold 240 acres of land so owned by him to one Frank Netlerville, which deed recited: "This land is sold subject to a mortgage of \$16,000, with accrued interest and taxes which the said Frank Netlerville agrees to pay as part of the purchase price." On April 4, 1911, Netlerville sold this land to Harry C. Rowe, which deed contained a like recitation. Rowe conveyed to Olive C. Dimon and Theodore H. Dimon on same date, and on May 18, 1911, they conveyed to John Loughrey and Theodore H. Dimon, and these last named grantees conveyed to Fulton County Coal and Power Company, a corporation, on May 20, 1911, which company is now the owner of the 240 acre tract subject to the incumbrance against it. All these conveyances were made subject to the \$16,000 mortgage.

On June 1, 1911, the Fulton County Coal and Power Company executed a trust deed to the Chicago Title & Trust Company, trustee, for said 240 acres, to secure the payment of \$150,000 in bonds issued of that date, which bonds were in the sum of \$500 each due thirty years after date with interest at six per cent. payable semiannually, which trust deed was made subject to mortgage of \$16,000. The appellant, Ella E. Southgate, is the holder and legal owner of 281 of said bonds of the value of \$140,500, and has no other security for the same than the 240 acre tract of land, and no part of same has been paid. Appellant and Chicago Title and Trust Company were not made parties to the original bill, but obtained leave of court to plead and filed an answer and cross-bill setting up their interest and asking that the 450 acre tract of land be sold first to satisfy the Curran mortgage.

On March 1, 1911, W. A. Phillips sold and conveyed the remainder of said 700 acre tract of land, being about

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450 acres, to one Thomas H. Lackland, which deed contained the following recitation: "This land is sold subject to all conditions of a certain mortgage for \$16,000 held by W. R. Curran, as trustee, of Pekin, Illinois. Having formerly owned another tract of land near this, containing 240 acres, this said 240 acres being also covered by the mortgage referred to above, and by the terms of the deed to the purchaser of the 240 acre tract, they agreed to pay the said \$16,000 as a part of the purchase price." June 16, 1911, Lackland conveyed said lands to John B. King and Thomas B. Lewis, which conveyance was made subject to \$16,000 mortgage.

King and Lewis were made parties defendant, and filed answer and cross-bill, claiming that the 240 acre tract should pay all of the \$16,000 mortgage, and asked that it be sold first to satisfy same. On July 1, 1912, John B. King conveyed, by warranty deed, the 450 acres to one J. H. White, but now claims it was in fact given as a mortgage, and on October 25, 1913, being long after suit was started, White, by quitclaim deed, conveyed back to King. On September 7, 1912, King conveyed same land by warranty deed to one John Winsor, but now claims it was also given as a mortgage. Winsor on May 20, 1913, and after the commencement of suit, conveyed by quitclaim deed to Herbert Powell, who on October 24, 1913, filed declaration of trust that he held title to secure payment of \$75,000 from John B. King and Thomas B. Lewis.

The contention of appellant, Ella E. Southgate, is that, under the doctrine of marshaling of securities, the original complainants, having a lien on the whole 700 acre tract while she only has lien on 240 acres, should be required to satisfy their mortgage first out of the 450 acre tract. The contention of John B. King is that, because of the recitations made in deeds of conveyance by W. A. Phillips, the original owner of

the whole tract, the 240 acre tract became liable for the payment of the whole of the mortgage first.

The contention of appellant cannot be sustained. The equitable rule of marshaling securities, whereby the lands mortgaged are required to be sold in the inverse order of alienation, will never be applied where the parties, by an agreement in their deed, have charged a mortgage upon land in a different manner. *Moore v. Shurtleff*, 128 Ill. 375.

It is clear from the recitations in the deed from Phillips to Netlerville for the 240 acres that they intended to and did charge that land with the payment of the whole of the mortgage of \$16,000, and that Netlerville took the land subject to the payment of the mortgage. The subsequent grantees of Netlerville took subject to the mortgage and with full knowledge and notice of the equities imposed upon him with regard to the payment of same. The appellant having taken the bonds with notice that the land which secured their payment was charged with the payment of the mortgage cannot have the rule of inverse order applied.

No objection or exception having been taken to the master's report that King and Lewis were the owners of the property, that question cannot now be raised in this court. The decree of the Circuit Court was clearly right, and is affirmed.

Affirmed.

MR. PRESIDING JUSTICE THOMPSON took no part in the consideration of this case.

Wallace v. Modern Woodmen of America, 188 Ill. App. 272.

James H. Wallace et al., Appellees, v. Modern Woodmen of America et al., Appellants.

INSURANCE, § 712*—*what essential to validity of amendment of articles of association of benefit society.* To constitute a valid amendment of the articles of association of a beneficial association organized under the Act of 1893 relating to "Fraternal Beneficiary Societies," the record of the proceedings of the association must show a substantial compliance with section 7½ of the Act, J. & A. ¶ 6654, which provides that articles may be changed in the manner prescribed by the rules of the association, and where the record of the proceedings does not show the adoption of an amendment by the number of votes required by its rules, there is no valid amendment.

Appeal from the Circuit Court of Sangamon county; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the April term, 1913. Affirmed. Opinion filed July 2, 1914.

TRUMAN PLANTZ, GEORGE W. MILLER, NELSON C. PRATT, CHARLES J. SCOFIELD, SIDNEY S. BREESE and NORTHCOTT & ORR, for appellants.

E. S. SMITH, for appellees.

PER CURIAM. This is a bill for an injunction to restrain appellant and its officers from putting into effect a certain by-law claimed to have been adopted by the Head Camp of the Modern Woodmen of America at an adjourned meeting held in Chicago in January, 1912.

The Modern Woodmen of America is a fraternal beneficiary society having a lodge system with a ritualistic form of work, and was incorporated in 1884. The general purpose and object of the association has been determined in the following cases: *Bastian v. Modern Woodmen of America*, 166 Ill. 595, and *Park v. Modern Woodmen of America*, 181 Ill. 214, and need not be further stated herein.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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The injunction is sought on the ground that said by-law is unreasonable and void and that under the law fraternal beneficiary associations are only authorized to levy assessments for the purpose of providing a sufficient surplus to reasonably provide for the emergency of suddenly increased death losses, and on the further ground that neither said by-law nor the change in the articles of the association authorizing and validating said by-law were legally adopted. The chancellor in the court below held that said by-law was unreasonable and void and granted a perpetual injunction against its enforcement.

Prior to the alleged adoption of the disputed by-law, the articles of association provided that the funds for the payment of death losses were to be realized from assessments on *surviving* members. Each member when he joined the association paid a certain rate according to his age at that time, and assessments were laid from time to time, as needed, to pay the death losses and expenses. The number of these assessments averaged from eight to ten a year.

The new by-law materially and radically changed the plan of insurance that had theretofore existed in said association, and at the time of its alleged adoption the articles of association of appellant contained no provision authorizing the adoption of a by-law providing for the plan therein embraced, and it was sought to validate said by-law by changing the articles of association so as to authorize it.

The new plan provided that one assessment each month should thereafter be laid regardless of the necessity therefor and also for a step-rate system of amounts to be paid as assessments. The step-rate system is one by which the member pays each year or group of years according to the actual cost of the society of the protection furnished him, and thus increases each year or group of years as age increases, as distinguished from the level rate by which the mem-

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ber pays more than the actual cost in the earlier years and less than the actual cost in the later years. The new by-law provided:

“Benefit Plan 1. From and after January 1, 1913, every beneficial member, heretofore or hereafter adopted, failing to elect prior to January 1, 1913, some other benefit plan, as herein authorized, and whose certificate is dated prior to May 1, 1912, shall be liable for, and shall during each and every calendar month during his life pay death benefit assessments, to be determined by his attained age, at his nearest birthday, on said January 1, 1913, in accordance with the following table of Whole Life Level Assessment Rates.”

Here follows a table of rates for attained ages from eighteen to fifty-four and over, ranging from 75 cents per \$1,000 at eighteen years to \$3 per \$1,000 at the age of fifty-four and over, payable monthly. This plan further furnishes an option whereby a member whose assessment rate exceeds \$2 per \$1,000 may pay \$2 per \$1,000 assessment in cash and have the remainder of his rate compounded annually charged as a lien against his certificate, but which he may discharge by payment during his lifetime.

This plan is compulsory unless the member elects to accept one of five other options. These options are based upon the step-rate system. As an illustration, option plan 4 provides that the member who had not passed his forty-fifth birthday January 1, 1913, who might elect prior to January 1, 1913, so to do, could surrender his old certificate and procure one for a term expiring on his fiftieth birthday, upon a rate to be paid at his attained age, according to the table set forth in this plan. This provided for term protection to age fifty.

The principal object and purpose of these changes is to provide for a larger surplus, and the effect is to greatly increase the rates of assessments. The increase in some cases amount to five hundred per cent.

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At the time the by-law was adopted the association had a surplus of over \$9,000,000. The evidence shows that the proposed change in rates would produce an accumulation or surplus of from \$15,000,000 to \$20,000,000 a year and that in ten years there would be created thereby a surplus of at least \$150,000,000. The evidence does not show that there was any immediate necessity for such a large surplus, but on the contrary it was shown that the association was in a flourishing condition and under the present system of rates had accumulated a surplus of over \$9,000,000, as above stated.

Section 5 of the articles of association prior to the alleged change therein provided, among other things, as follows:

“The funds for the payment of death losses or accident indemnity are to be realized from assessments on surviving members. The funds for the payment of the ordinary expenses of doing the business are to be realized by assessments on its members, thus creating a ‘General Fund.’ The funds collected to pay death losses or accident indemnity is known as the ‘Benefit Fund’ and can be appropriated for no other purpose. The Local Camps shall be subordinate to and shall report to the Head Camp. The Head Camp shall pay all losses from the benefit fund collected from the surviving members of the Fraternity by the proper officers of the Local Camps and shall have same forwarded to the Head Camp and by its officers disbursed.”

The Head Camp recognized the fact that the plan provided by the new by-law could not be sustained under the above section of the articles of association, and proceeded to change said section by leaving out the word “surviving” and having it read as follows:

“The funds for the payment of death losses shall be created and maintained by assessments on the members and by interest on or other accretions to said fund and shall be known as the benefit fund.”

Wallace v. Modern Woodmen of America, 188 Ill. App. 272.

The validity of the by-law, in so far as its adoption is concerned, depends upon whether the change in the articles of association was legally made.

Section 7½ of the Act in regard to the organization and management of fraternal beneficiary societies, in force 1893 (J. & A. ¶ 6654), adopted by the association, provides as follows: "Any corporation, association or society organized under the provisions of this act, amended by this section, may change its articles of association in the manner prescribed by its own rules, etc." One of the fundamental laws of the association was that the articles of said association might be changed at any session of the Head Camp by resolution duly designating and setting forth the change sought to be made, and the affirmative vote of two-thirds of the members of such Head Camp should be necessary to the adoption of such resolution. The record of the proceedings of the Head Camp shows that the resolution for the change in the articles of association was put to a *viva voce* vote and an announcement made that it was unanimously adopted. The record does not affirmatively show how many members of the Head Camp were present when the vote was taken, but it does affirmatively show that a number were not present at that time. There is nothing in the record of said proceedings to show that two-thirds of the members of the Head Camp voted in favor of said resolution or that there was a quorum of said Head Camp present and that two-thirds of the quorum voted for said resolution. The resolution might have been voted for unanimously by those present and yet not have received the requisite two-thirds vote in the affirmative. While it is undoubtedly true that in the passage of an amendment or in abrogation or repeal of ordinary by-laws of an association or corporation that a majority vote of those entitled to vote thereon will be sufficient and that ordinarily the law will presume that a majority were present and that said by-law was legally passed, yet such rule and pre-

sumption cannot obtain as to the adoption of resolutions changing the articles of association. The latter embraced the powers, rights and privileges granted by the sovereign power of the State and can only be changed in the manner provided by the sovereignty which grants them. The statute provided that the articles of association of appellant could be changed in the manner provided by its own rule, which was by an affirmative vote of two-thirds of the delegates of the Head Camp, and while the courts do not look with favor upon mere technical objections in such cases and endeavor to carry out the will of the members although informally or irregularly expressed, yet there must be a substantial compliance with the law. It was immaterial what manner or method of vote was adopted, or how the vote was announced or recorded, provided that the record shows that there was an affirmative vote of two-thirds of the delegates of the Head Camp. *Bastian v. Modern Woodmen of America, supra*. The question whether the presumption would be that this resolution was regularly adopted in collateral proceedings is not involved, as this is a direct proceeding by the members of the association itself challenging the legality of its adoption, and unless the articles of association were lawfully changed then the by-law in question would have no effect. Where the statute prescribes the manner in which the articles of association of a corporation of this character may be changed, the records of the association must show a substantial compliance with such requirements. The records of the proceedings in regard to the adoption of this resolution failing to show its adoption in the manner required, and as there was no provision in the articles of association then in force authorizing the adoption of said by-law, said by-law necessarily becomes void and inoperative.

The decree of the Circuit Court will therefore be affirmed.

Affirmed.

C A S E S
DETERMINED IN THE
FOURTH DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1914.

The People of the State of Illinois, Defendant in Error, v. Thomas H. Jones, Plaintiff in Error.

(Not to be reported in full.)

Error to the Circuit Court of Hamilton county; the Hon. ENOCH E. NEWLIN, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

Statement of the Case.

Complaint by the People of the State of Illinois against Thomas H. Jones, charging the defendant with "the criminal offense of trespass by wilfully entering and passing over an improved field, after being expressly forbidden so to do by A. J. Mangis, the owner of said field." Defendant was found guilty before a justice of the peace, and on appeal to the Circuit Court the jury returned a verdict of guilty and assessed a fine of five dollars. A motion for a new trial was overruled and the court entered judgment against defendant for the amount of the fine and costs. To reverse the judgment, defendant prosecutes a writ of error.

Kuhn v. Pulaski County Mill and Elevator Co., 188 Ill. App. 279.

D. J. UNDERWOOD, H. ANDERSON and J. W. JONES, for plaintiff in error.

J. H. LANE, for defendant in error; A. M. WILSON, of counsel.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. **TRESPASS, § 64***—*when person not guilty of statutory offense of trespass.* On prosecution a person charged with the criminal offense of trespass on the improved field of another under Criminal Code, ch. 38, § 266, Hurd's R. S., J. & A., ¶ 3958, *held* that the defendant was not expressly forbidden to enter upon the premises as required by statute, where the owner posted a notice on the premises addressed to the defendant and the highway commissioners telling them "to stay off his possession there, and not to come there to make a road," but defendant never saw the notice, and another time when the defendant went to the owner and asked him about fencing the land the owner answered that he had nothing to say and that he wanted him to keep off his premises.

2. **TRESPASS, § 64***—*propriety of proceeding to try title to land.* The title to land cannot properly be tried in a suit for the criminal offense of trespass.

**Paul Kuhn et al., trading as Paul Kuhn and Company,
Appellants, v. Pulaski County Mill and Elevator
Company, Appellee.**

(Not to be reported in full.)

Appeal from the Circuit Court of Pulaski county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kuhn v. Pulaski County Mill and Elevator Co., 188 Ill. App. 279.

Statement of the Case.

Action by Paul Kuhn and Elizabeth A. Kuhn, trading as Paul Kuhn and Company, against Pulaski County Mill and Elevator Company to recover a sum claimed to be due as an overcharge in a sale to plaintiffs of certain wheat which was not up to the grade contracted for. The suit was originally commenced before a justice of the peace where plaintiff had judgment for \$176.10, but on appeal to the Circuit Court the cause was tried by the court with a jury and the issues were found for the defendant and judgment was entered against plaintiffs for costs. To reverse the judgment, plaintiffs appeal.

FRED HOOD, for appellants.

CHARLES L. RICE, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 105*—*when corporation not liable on contract of assumed agent.* Where a corporation engaged in buying and selling grain leased its property to others who carried on the same kind of business and made a sale of a shipment of wheat through a correspondence in which they used the letter head of the corporation signed by one of them as agent, *held* in an action by the purchaser against the corporation to recover back an overpayment made, for the reason that wheat was not up to the grade agreed to be furnished, that the evidence was insufficient to show any liability on the part of the defendant, there being no evidence to show that the defendant authorized the sellers to use its name or had knowledge of its use until after the transaction and no proof of any act of omission or commission on the part of defendant to render it liable.

2. PRINCIPAL AND AGENT, § 237*—*proof of agency.* The mere showing that one assumed to act as agent is not sufficient to establish an agency, nor can the agency be proved by an act of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stafford v. Kimmel, 188 Ill. App. 281.

supposed agent which was neither expressly nor impliedly authorized by the alleged principal.

3. **PRINCIPAL AND AGENT, § 225***—*burden of proving authority.* One attempting to take advantage of the act of one claiming to be an agent has the burden of showing his authority.

**G. C. Stafford, Appellee, v. H. E. Kimmel, Executor,
Appellant.**

1. **EXECUTORS AND ADMINISTRATORS, § 284***—*when appeal to Circuit Court properly dismissed for failure to file appeal bond.* On appeal to the Circuit Court from an order of the County Court allowing a claim against an estate, the appeal bond is jurisdictional, and where no appeal bond whatever has been filed the court may properly dismiss the appeal and deny appellant's cross-motion to file an appeal bond *nunc pro tunc*.

2. **APPEAL AND ERROR, § 654***—*jurisdiction of court when no appeal bond filed.* Where a party entitled to an appeal files no bond or instrument in the nature of a bond within the time prescribed by law, the court, to which the appeal is taken, cannot permit a bond to be filed and has no jurisdiction to do anything but dismiss the appeal.

3. **APPEAL AND ERROR, § 654***—*right of Probate Court to dispense with requirement of filing appeal bond.* Section 11 of the Probate Court Act, J. & A. ¶ 3269, providing for appeals to the Circuit Court upon the appellant giving an appeal bond in such amount and upon such conditions as the court shall approve, cannot be construed as authorizing the Probate Court to make an order that no bond whatever be filed, nor is such section applicable to County Courts acting as Probate Courts in counties having a population of less than 70,000.

Appeal from the Circuit Court of Perry county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

B. W. POPE, for appellant.

GEORGE W. DOWELL, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Appellee, G. C. Stafford, filed a claim for five hun-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stafford v. Kimmel, 188 Ill. App. 281.

dred dollars in the County Court of Perry county against the estate of Matthew Laxon, deceased, of whose last will and testament H. E. Kimmel was executor. The claim was contested by the executor but allowed by the County Court, and the executor prayed an appeal from the order allowing the claim to the Circuit Court. The county clerk filed a transcript of the proceedings in the office of the clerk of the Circuit Court, and later appellee entered a motion in that court to dismiss the appeal because no appeal bond had been filed. Appellant then filed a cross-motion asking leave of court to file an appeal bond *nunc pro tunc*. With that motion he filed an affidavit stating that the estate was solvent, that he had called upon the county judge to fix the amount of the appeal bond, and was informed by the judge that no appeal bond was necessary, as the estate was solvent and any amount paid would be through the County Court which had control of the estate through the executor, who was an officer of the court, and duly bonded to perform the duties of his office; that said claim was allowed upon the hearing of evidence at the June term, 1913, of said County Court, but that judgment was not finally entered thereon until the October term, 1913; that said executor prayed an appeal to the following November term of the Circuit Court of said county; that his application to the county judge for leave to file a bond was made within five days after final judgment was rendered in said County Court. It should be noted, however, that the record in this case shows that the judgment allowing said claim was entered on June 3, 1913. Appellee contested the cross-motion and the court denied the same, granted appellee's motion, dismissed the appeal for want of an appeal bond, and entered judgment against appellant for costs.

It is the complaint of appellant here that the Circuit Court erred in not permitting him to file a bond as prayed for in his petition, and also in dismissing the appeal, the latter for the reason that an appeal bond

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is not absolutely necessary if the court so orders, or makes no order for a bond to be filed. Section 68 of chapter 3 of the Revised Statutes of this State (J. & A. ¶ 117) provides that, "in all cases of the allowance or rejection of claims by the county court, as provided in this act, either party may take an appeal from the decision rendered to the circuit court of the same county, in the same time and manner appeals are now taken from justices of the peace to the circuit courts, by appellant giving good and sufficient bond, with security, to be approved by the county judge." The act in reference to justices provides that the party praying for an appeal from a judgment of a justice of the peace shall, within twenty days from the rendition of the judgment from which he desires to take the appeal, enter into bond with security to be approved by the justice, in case the bond is filed with him, or by the clerk of the court to which the appeal is taken in case the bond is filed with such clerk; and this act further provides that no appeal from a justice of the peace shall be dismissed for any informality in the appeal bond, but it shall be the duty of the court before whom the appeal may be pending to allow the party to amend the same within a reasonable time so that a trial may be had upon the merits of the case. R. S. ch. 79, pars. 115, 179. (J. & A. ¶¶ 6976, 7038.)

Appellant insists that as he, in good faith, called upon the county judge of said county to fix the amount of bond preparatory to making the same, but did not file it because the county judge told him he did not require an appeal bond in such cases, that he had done all that was necessary for him to do in the County Court or before the county judge to perfect his appeal, and that he should have been permitted to file a bond in the Circuit Court. Had appellant filed a bond within the time prescribed by the statute, had it been ever so imperfect, a different question would have arisen, as under the statute above referred to and the rulings of our courts of appeal it would have been the duty of

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the Circuit Court to permit appellant to thereafter file a good bond in a time, to be fixed by the court, and not to dismiss the appeal on account of the insufficiency of the original appeal bond, except on a failure to file a sufficient bond within the time so fixed: *Horner v. Goe*, 64 Ill. 178; *Dunaway v. Campbell*, 59 Ill. App. 665; *Enright v. Rehbach*, 133 Ill. App. 50.

It is also well determined that where the party entitled to take the appeal files no bond or instrument in the nature of a bond, within the time prescribed by law, the court to which the appeal is taken cannot legally permit a bond to be filed for the reason that the right of appeal is purely statutory; that where the statute fixes the time within which the appeal bond must be filed, the provision is mandatory and jurisdictional and in such case the court to which the appeal is taken has no jurisdiction to do anything but dismiss the appeal. *Hill v. City of Chicago*, 218 Ill. 178; *Rozier v. Williams*, 92 Ill. 187; *Fairbank v. Streeter*, 142 Ill. 226. This rule has been applied by our courts not only to cases where no bond has been attempted to be filed, but also to cases where a joint appeal has been granted, and only one of the persons appealing files a bond, and also in cases where others than those entitled to appeal file a bond, it being held in such cases that no bond can be filed by the proper parties after the time prescribed by the statute has expired. *Tedrick v. Wells*, 152 Ill. 214; *Fay v. Seator*, 88 Ill. App. 419; *Blood v. Harvey*, 81 Ill. App. 187. In *Tedrick v. Wells, supra*, where the parties for whose use a suit was brought on a replevin bond, filed an appeal bond in which the nominal plaintiff who sued for their use did not join, the Appellate Court denied a motion for leave to file an amended appeal bond and sustained a motion to dismiss the appeal. This action of the Appellate Court was sustained by the Supreme Court which said in the course of its opinion: "You can no more amend a thing that has no existence,—not even potential,—than you can amend a void thing." In

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this case appellant had wholly failed to file any appeal bond, and his motion in the Circuit Court was to file an appeal bond *nunc pro tunc*. As no appeal bond had been filed the Circuit Court had acquired no jurisdiction and had no power to sustain the cross-motion of appellant for leave to file a bond, but it properly and necessarily sustained the motion of appellee to dismiss the appeal. Appellant's contention that it is not necessary that a bond be filed if the County Court so orders or makes no order for a bond to be filed is based upon section 11 of the Probate Court Act (J. & A. ¶ 3269), which provides that appeals from the final orders, judgments and decrees of the Probate Courts to the Circuit Courts of their respective counties may be taken upon the appellant giving bond in security in such amount and upon such condition as the court shall approve.

Appellant's theory is that under this section the Probate Court may make an order that no bond whatever be filed. We do not agree to this construction of the law, but even if it were correct that provision of the law could not be availed of here as it is part of the act providing for the establishment of Probate Courts in counties having a population of 70,000 or more, and does not apply to County Courts acting as Probate Courts in counties having less population, like Perry county, where these proceedings took place.

The judgment of the Circuit Court, dismissing the appeal of the executor from the County Court, will be affirmed.

Judgment affirmed.

**Ella Stafford, Appellee, v. H. E. Kimmel, Executor,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Perry county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

Diehl v. East St. Louis Light and Power Co., 188 Ill. App. 286.

Statement of the Case.

Ella Stafford was allowed seven hundred and fifty dollars as a claim against the estate of Matthew Laxon, deceased, for services rendered deceased as a house-keeper and nurse. H. E. Kimmel, executor, prayed an appeal to the Circuit Court from the order of the County Court, allowing the claim. A transcript was filed and the case docketed in the Circuit Court where the claimant made a motion to dismiss the appeal for want of an appeal bond, and the motion was sustained and the appeal dismissed.

The questions raised on this appeal are identical with those involved in the case of *Stafford v. Kimmel*, p. 281, *ante*, and the decision in that case *held* controlling.

B. W. POPE, for appellant.

GEORGE W. DOWELL, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

William Diehl, Appellee, v. East St. Louis Light and Power Company, Appellant.

1. ELECTRICITY, § 27*—*when evidence sustains recovery for injuries resulting from fall of glass insulator from pole.* In an action against an electric light and power company for personal injuries sustained by plaintiff by reason of a defective glass insulator falling from a cross arm of one of defendant's poles situated at the edge of a sidewalk, *held* that a verdict for plaintiff was sustained by the evidence, it appearing that the insulator had been left attached to the arm without being used to support wires for several years, and that for a month or two before the accident its cracked condition was easily discernible upon examination.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. NEGLIGENCE, § 221*—*when failure of instruction to confine jury to negligence alleged not misleading.* The fact that an instruction did not use the words of the declaration as to the negligence complained of, does not render it misleading, where no other negligence than that named in the declaration was sought to be proved and the proof concerning the negligence charged in the declaration was sufficient to warrant a verdict for plaintiff.

3. INSTRUCTIONS, § 110*—*when cannot be complained of as authorizing recovery on defective count.* The fact that an instruction given would authorize a verdict for plaintiff on a defective count in the declaration cannot be complained of where the defect in the count would not render it insufficient after verdict.

4. NEGLIGENCE, § 128*—*when count in declaration sufficient after verdict.* Where a count in the declaration charged an electric light and power company with negligently permitting a glass insulator to be upon a pole in a broken condition, but failed to charge that the company knew or in the exercise of reasonable care should have known that the insulator was in defective condition, *held* that though the count would have been subject to a special demurrer for such defect, yet the word "permitted" implies notice and made the count sufficient after verdict.

Appeal from the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

BARTHEL, FARMER & KLINGEL, for appellant.

D. J. SULLIVAN, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

William Diehl, appellee, brought this suit to recover damages for personal injuries received through the alleged negligence of the East St. Louis Light and Power Company, appellant. The jury found the issues for appellee and assessed his damages at six hundred dollars, but a remittitur of one hundred dollars was entered by appellee and the court gave judgment against appellant for five hundred dollars, from which an appeal is taken to this court. The complaint of appellant is that the evidence did not show a right of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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recovery and that its interests were prejudiced by several erroneous instructions given at the request of the appellee.

Appellant, as it appears from the proofs, is engaged in furnishing electricity for the use of patrons in East St. Louis and one of its electric light poles is located at the edge of the sidewalk, a few feet north of Missouri avenue on Sixth street in said city. There are cross arms on said pole, with wires attached thereto, some twenty-five or thirty feet above the sidewalk. To the end of one of these cross arms is attached an iron bracket, called a spreader, the lower end of which drops below the cross arm and turns up, forming a pin, upon which threads were cut so that a glass insulator could be screwed thereon to carry wire. Formerly an insulator was screwed upon this solid iron pin, which had been used at one time by appellant for insulating the wire connection with the Beykirch grocery store immediately across the sidewalk on the west side of the street. The connection with the building, however, was afterwards abandoned, and for some time prior to the time appellee was injured the wires had been removed and the glass insulator left on the spreader unused. On December 5, 1912, appellee, who was an employee of said grocery store, brought a large box of papers out of the store and set it down on the edge of the sidewalk near the pole. A paper had fallen from the box when he set it down and as he reached to get it part of the insulator dropped from the pole, striking the back of his hand and wrist and cutting them so severely that he was compelled to lose two months' work, and leaving the usefulness of his hand considerably impaired. Two witnesses for appellee, who lived above the grocery store, testified the insulator had been cracked for from one to two months prior to its falling and this crack was quite visible. One of them stated she had lived there three years and had never seen any wire on it.

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The declaration contained two counts. The first charged that appellant permitted the insulator to be upon the iron bracket or holder in a split or broken condition, so that it was liable to fall upon pedestrians or persons on the sidewalk at that place, and because of such defective condition it fell upon and injured appellee. The negligence charged in the second count was the placing of the glass insulator upon an iron screw or holder, which was stated to be improper and dangerous, for the reason that the insulator was liable to be split and broken by changes in temperature effecting the iron screw or holder; that such danger was known to appellant or should have been known to it by the exercise of ordinary care. The theory of the defense appeared to be that the insulator in question was one of a kind in common use by the Company in East St. Louis and other places and that so far as the witnesses examined were concerned they did not know of insulators having been split or broken when placed upon iron pins, like the one in question, through expansion and contraction of the pin caused by changes of temperature.

An examination of the evidence leads us to the conclusion that it warranted a finding by the jury that said insulator had been left upon the iron pin for several years with no wire around it and was not, during that time, necessary to appellant or used by it in conducting its business; that for a month or two before the accident it was cracked and its condition was easily discernible upon examination; that it was placed some twenty-five or thirty feet above the sidewalk where persons were passing back and forth; that in its cracked and broken condition it might fall at any time to the walk below and was therefore dangerous to persons passing along; that a piece of it did fall upon appellee and injure him severely. It was for the jury to determine from all the facts whether the charges made in the declaration were proved, and we find no good

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reason for not agreeing with the conclusion which they arrived at in this case.

Appellant complains of appellee's given instruction No. 2, which told the jury that if they believed from a preponderance of the evidence the use of said insulator above the public sidewalk at the point in question, as it was there being used as shown by the evidence, was negligence on the part of the defendant and such negligence caused appellee's injury, and he was at the time in the exercise of ordinary care for his own safety, they should find the defendant guilty, because the instruction did not confine the negligence to that charged in the declaration. While this instruction did not use the words of the declaration as the negligence complained of is there set forth, yet the jury could not have been misled by it as no other negligence than that named in the declaration was sought to be proved, and the proof concerning the negligence charged in the declaration was, as we have above seen, sufficient to warrant the verdict against appellant. The complaint of appellee's third given instruction is that it authorized a verdict for appellee in case the jury found the defendant guilty of negligence as alleged in the first count of the declaration, it being claimed by appellant that the first count did not contain the elements of a good cause of action, for the reason that it nowhere charges appellant knew or by the exercise of reasonable care should have known that the insulator was split or broken. While it is true that the first count had no charge of knowledge on the part of appellant, or that it might have acquired knowledge by the exercise of reasonable care, of the condition of the insulator, yet it does charge that appellant negligently permitted the insulator to be upon the bracket in a broken condition. While this count might have properly been a subject of special demurrer for the defect mentioned, yet the word "permitted" implies notice and is sufficient to sustain the count after verdict. *Peebles v. O'Gara Coal Co.*, 239 Ill. 370; *City of Chicago v. Stearns*, 105 Ill.

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554. The instructions as a whole appear to have fairly informed the jury of the law governing the case, and we are of opinion that upon the facts and the law the judgment was substantially correct and should be affirmed.

Judgment affirmed.

**Thomas C. McAleeman, Appellee, v. East St. Louis
Light and Power Company, Appellant.**

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

Statement of the Case.

Action by Thomas C. McAleeman against East St. Louis Light and Power Company to recover for injuries to plaintiff's horse, which were of such a nature as to render it necessary that it be killed, and for damages to the wagon and harness alleged to have been caused by the negligence of a servant of defendant in throwing the end of a rope to another servant at the top of a telegraph or telephone pole so as to cause the horse, which was hitched nearby, to take fright and run away. There was a verdict in favor of plaintiff for \$300, but a remittitur was entered by plaintiff and judgment was given for \$213.60. Some days later the judgment was vacated and plaintiff given leave to file an additional count to the declaration.

In the meantime an appeal had been prayed from the judgment and an appeal bond filed. Plaintiff instead of filing an additional count filed a complete amended declaration. He again entered the remittitur and judgment was a second time entered for \$213.60

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and an appeal allowed. The last amended declaration filed omitted the former allegations of negligence and in lieu thereof charged that a servant of defendant negligently dropped or threw the end of a rope from the top of a telegraph pole or electric light pole.

For the purpose of this appeal the Appellate Court treated the case as though the amendment had been allowed in the usual manner upon the trial.

BARTHEL, FARMER & KLINGEL, for appellant.

M. D. BAKER and DAN MCGLYNN, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. PLEADING, § 246*—*effect of amendment as abandonment of former pleading.* Where a plaintiff files his final amended declaration he abandons his former declaration and the last declaration cannot be aided by anything contained in the former.

2. NEGLIGENCE, § 187*—*when proof insufficient to sustain allegation of negligence.* In an action for damages resulting from the death of a horse and damages to a wagon and harness alleged to have been caused by the negligence of a servant of defendant in dropping or throwing the end of rope from the top of a telegraph or electric light pole so as to cause the horse to become frightened and run away, *held* that a verdict for plaintiff could not be sustained, for the reason that the proof did not tend to sustain the charge of negligence in the declaration, the defendant's witnesses testifying that the rope was not thrown in any manner and plaintiff's principal witness testifying that the end of the rope was thrown from the ground to a servant at the top of the pole.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kneedler v. Bankers' Accident Ass'n, 188 Ill. App. 293.

Forrest Kneedler, Appellee, v. Bankers' Accident Association of Illinois, Appellant.

1. **INSURANCE, § 704***—*when judgment based on stipulation sustained by the record.* A judgment for plaintiff in an action for accident insurance based on a stipulation of facts, *held* supported by facts appearing in the record, though the policy was not included in the stipulation or introduced in evidence.

2. **INSURANCE, § 704***—*when Appellate Court will not assume that act in which insured was engaged was unlawful.* On appeal from a judgment allowing recovery on an accident policy where the case was tried on a stipulation of facts that the insured was engaged in cockfighting at the time of the injury, the Appellate Court cannot assume that cockfighting was unlawful where the stipulation and the evidence failed to disclose whether the act took place in this State.

3. **INSURANCE, § 667***—*when stipulation insufficient to show unlawful act caused the injury.* Where it was stipulated in an action for accident insurance that plaintiff was engaged in cockfighting at the time of the injury, *held* that even if the act was unlawful the stipulation did not so connect the injury with the act of cockfighting as to show that the unlawful act was the agency which brought about the injury.

4. **INSURANCE, § 408***—*when injury while engaged in unlawful act does not preclude recovery.* The mere fact that a person insured against accidental injury received such injury while engaged in the commission of an unlawful act does not necessarily preclude him from recovering on the policy.

Appeal from the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

SILAS COOK and KRAMER, KRAMER & CAMPBELL, for appellant.

WILLIAM F. BORDERS, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Forrest Kneedler, appellee, brought suit before a justice of the peace against Bankers' Accident Asso-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kneedler v. Bankers' Accident Ass'n, 188 Ill. App. 293.

ciation of Illinois, appellant, and recovered a judgment, from which an appeal was taken to the Circuit Court where a jury was waived and trial had before the court, upon the following stipulation:

"It is hereby stipulated by and between the parties in the above entitled cause, as follows: It is agreed that a policy of insurance No. 2317, in the defendant company was issued to the plaintiff under date of January 16th, 1911, and that all premiums due thereon, have been paid and were paid at the date of injury, to wit, June 15th, 1912.

It is further stipulated that an accidental injury was received by the plaintiff on or about June 15th, 1912. It is further stipulated that the plaintiff suffered material injury and substantial loss of time. It is further stipulated that the necessary proper proofs of loss within the necessary time were furnished to the defendant company. It is further stipulated that the plaintiff at the time of injury above referred to was engaged in and assisting in cockfighting. It is further stipulated that if any judgment is rendered in this case in favor of plaintiff, the judgment shall be for the sum of \$86.78.

It is further stipulated that the above matters are agreed upon for the purpose of shortening the case, and that said cause is to be tried upon the agreed state of facts hereinabove set forth."

Judgment was recovered by the appellee in the Circuit Court for \$86.78, the amount agreed upon in the stipulation as the amount due if appellee should be found entitled to recover.

On this appeal the sole question raised in appellant's argument is that there was no fact appearing in the record sufficient to support the judgment, because the policy was not included in the stipulation or introduced in evidence. The fair interpretation of the stipulation is that on June 15, 1912, appellee held a policy of insurance in Bankers' Accident Association of Illinois on which all premiums were fully paid; that on said

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day he was accidentally injured and thereby suffered material injury and substantial loss of time; that he made proper proofs of loss in due time; that his damages amounted to \$86.78, and that the injury was received by him while engaged in assisting in cockfighting. We do not agree with counsel for appellant that it was necessary the policy of insurance should be introduced in evidence or set forth in stipulation to entitle appellee to recover. It is argued by appellant that from aught that appears in the stipulation, which contains all the proofs, the policy sued on might have been a fire insurance policy. This argument does not appear to us to be reasonable or well founded, as the stipulation shows that appellee held a policy of insurance issued by appellant; that he received an accidental injury and that proper proof of loss was furnished appellant within the required time. We think the irrefutable inference from the stipulation is that appellee was insured by appellant not against loss to property by fire, but against accidental injury, and that proper proof of loss could only be made in case of accidental injury under a policy covering accidental injuries which might be received by appellee. That the injury was a personal one is also evidenced by the statement of the stipulation that the same was received while appellee was engaged in and assisting in cockfighting. Whether the cockfighting took place in the State of Illinois or not the stipulation fails to disclose, and in the absence of proof upon the subject it cannot be assumed by this court that the act was unlawful where committed. But even if it were shown that the cockfighting occurred within this State, the stipulation does not so connect the injury with the act of engaging in cockfighting as to show that the unlawful act was the agency which brought about the injury. We have held that the mere fact that a person insured against accidental injury received such an injury while in the commission of an unlawful act does not necessarily

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preclude him from recovering on his policy against the company issuing the same. *Hutton v. States Acc. Ins. Co.*, 186 Ill. App. 499.

The judgment of the trial court in this case will be affirmed.

Affirmed.

Frank J. Owens, Administrator, Appellee, v. Baltimore & Ohio Southwestern Railroad Company, Appellant.

1. RAILROADS, § 516*—*duty to trespassers or mere licensees on right of way* A railroad company owes no duty to a trespasser or a mere licensee on its right of way except not to wantonly or wilfully injure him.

2. RAILROADS, § 583*—*when evidence insufficient to sustain recovery for death of trespasser on right of way.* In an action against a railroad company for the death of plaintiff's intestate alleged to have been caused by the defendant wantonly and wilfully driving and managing its train so that the deceased while walking along defendant's right of way was struck and killed, *held* that the evidence was insufficient to sustain a verdict for plaintiff, it appearing that the deceased had no greater rights on the right of way than a mere licensee and that the engineer did see the deceased before he was struck, and there was an entire absence of proof showing or tending to show wanton or wilful acts or a reckless disregard of the safety of others on the part of employees in charge of the engine.

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the March term, 1914. Reversed with finding of facts. Opinion filed July 28, 1914.

KRAMER, KRAMER & CAMPBELL, for appellant; EDWARD BARTON, of counsel.

SILAS COOK and LOUIS BEASLEY, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Frank J. Owens, administrator of the estate of Joseph L. Owens, brought this suit to recover damages occasioned by the death of his said intestate, who was struck and killed by an engine drawing one of appellant's passenger trains.

The first of the three counts of the declaration charged that the Baltimore and Ohio Southwestern Railroad Company, on July 26, 1913, while deceased was walking on its right of way in the city of East St. Louis, wantonly and wilfully drove and managed its locomotive engine and train at a high and dangerous rate of speed, to wit, twenty to thirty miles an hour, in excess of the ordinance of said city, and that by reason thereof deceased was struck by said engine.

The second count alleges the locomotive and train were wantonly and wilfully driven and managed, going at a high and dangerous rate of speed and that no bell was rung continuously, as provided by the city ordinance.

The third, that no bell was rung, no whistle sounded or warning of any kind given while said train was running at a high and dangerous rate of speed. There was a plea of the general issue followed by a verdict and judgment for five hundred dollars against the railroad company, from which it has appealed to this court, contending that the judgment should be reversed, because the trial court erred in not giving its peremptory instruction offered at the close of the evidence and also for errors alleged to have been committed by the court in regard to the instructions.

There were few witnesses who were present at the time of the accident, and as their testimony is not conflicting to any considerable extent, it can easily be determined what the true conditions were at that time, and the proofs show them to have been as follows: In the city of East St. Louis appellant has three tracks on its right of way running easterly from a street

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known as Exchange avenue towards the city limits, the south track being the inbound track, the middle track the outbound track and the north track a switch. There was a space of thirty feet between the north and the south track. For a number of years persons have been accustomed to pass over appellant's right of way in going from Exchange avenue to streets and alleys east of it. The deceased was a painter, sixty-two years of age, who worked part of the time at his trade and at other times was employed about the stock yards. On the morning of July 26, 1913, Henry Grimm and Gus Roeske were in a saloon at the corner of Seventh street and Exchange avenue. Grimm and Roeske were going fishing and shortly afterwards started to the right of way, thence east along the same between the two main tracks. Soon afterwards they looked back and saw deceased following between the same tracks and from forty to seventy-five yards behind them. Very shortly after this they met a freight train coming towards them on the south track. As near as can be determined deceased crossed over from the place where he was walking between the main tracks to the space between the middle track and the switch, but about the time the freight train reached Exchange avenue Roeske again looked around and saw a passenger train of appellant's coming from the west and close upon deceased, who then appeared to be upon or north of the middle track upon which the train was coming east and some thirty yards behind them. These two were on the south side of the track, and as Roeske saw the danger of deceased he called out to him, "look out, the passenger." It was clear deceased either attempted to cross the track or was traveling along the same at this moment, at any rate he apparently did not hear the warning and was struck and killed. His body fell or was cast to the north side of the train which ran about six car lengths after striking him.

The only testimony on behalf of appellant was that of the engineer and fireman. The former testified that

his place was on the south side of the engine; that he saw two men ahead of him between the two main tracks; that the bell was rung automatically and he sounded the whistle; that the two men seemed bewildered and he was afraid they would jump in front of him which caused him to blow an alarm; that he did not see deceased and did not know he had struck him until the fireman called to him, and that there was nothing to prevent him from seeing any one who might be between the engine and the two men. The fireman testified that he was putting in fire when the conductor sounded the alarm; that he raised up to see what the trouble was and saw the deceased about ten feet ahead outside the rail; that he then "hollered" and the engineer applied the brakes. Roeske testified "there was lots of whistles up there and bells rung" but that he could not tell whether the passenger train was whistling or not, while Grimm stated that the freight train kept whistling but that he could not tell whether he heard the passenger train whistle. Several other witnesses testified either that the signals were not given or that they did not hear them given before deceased was struck.

We are rather inclined to the belief that the weight of the evidence shows that signals were given by bell and whistle just before the engine reached deceased, but we do not think a decision of that question essential for the proper disposition of this case. The most that can be said in favor of deceased's rights at the time he received his injuries is that he was a mere licensee upon appellant's right of way at a point where he and others had been permitted to travel. Under the circumstances appellant owed no duty to deceased except not to wantonly or wilfully injure him, and this rule of law as applicable to this case was recognized by appellee by the fact that he charged that the injury was caused by the wantonness and wilfulness of appellant in each count of the declaration. Before appellee could recover therefor, it was necessary for him to

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prove by a preponderance of the evidence that the injury was caused by the wilfulness or wantonness of appellant, or by such gross negligence on its part as to amount to wilfulness of wantonness.

In the case of *Illinois Cent. R. Co. v. O'Connor*, 189 Ill. 559, where it was attempted to recover for personal injuries received by O'Connor, who was knocked down by a passing train while he was traveling upon the railroad right of way at a point where many persons were accustomed to go, the Court said: "The plaintiff was traveling upon defendant's right of way, not for any purpose of business connected with the railroad, but for his own mere convenience, as a footway, in reaching his home on return from a search after his cow. There was nothing to exempt him from the character of a wrongdoer and trespasser in so doing further than the supposed implied assent of the company, arising from their noninterference with a previous like practice by individuals. * * * The place was one of danger, and such persons went there at their own risk, and enjoyed the supposed implied license subject to its attendant perils. At the most, there was here no more than a mere passive acquiescence in this use. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident." In the same case the Supreme Court also said: "This court is committed to the doctrine that a railroad company, in the operation of its trains, owes no duty to a trespasser upon its right of way or tracks except that it will not wantonly or wilfully inflict injury upon him, and we have frequently held that the mere fact that signals required by statutes and ordinances are not given, even though those operating its trains may have knowledge of the fact that persons have been in the habit of crossing its tracks or walking upon them at places other than public crossings or public places, will not amount to proof of wilful and wanton disregard of duty toward such trespassers."

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In respect to the matters above mentioned, there is no difference in law between a trespasser and a mere licensee. In *Illinois Cent. R. Co. v. Eicher*, 202 Ill. 556, it is held: "A railroad company owes no duty to a person walking along its tracks without its invitation, either expressed or implied, except to refrain from wantonly or wilfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril; and it makes no difference in that respect whether he is a trespasser, a mere licensee or one who is on the track by mere sufferance, without objection of the company."

It has sometimes happened that the negligence of a party causing an injury is so gross and reckless as to amount to wilfulness or wantonness. In the case of *Chicago City Ry. Co. v. Jordan*, 215 Ill. 390, the rule is laid down: "Where there is a particular intention to injure, or a degree of wilful or wanton recklessness which authorizes a presumption of an intention to injure generally, the act ceases to be merely negligent and becomes wilful or wanton. In such a case there may be an actual intent to injure, or such a conscious or intentional disregard of the rights of others as to warrant a conclusion that an injury was intended."

Appellee insists that the engineer must have seen deceased as he approached, but the engineer testified that he did not see him and did not know that he had struck deceased until after the accident occurred. The surrounding conditions, as shown by the proofs, do not seem to us to impel the inference that the engineer must necessarily have seen deceased before the latter was struck or even that he must necessarily have done so had he exercised ordinary care. Indeed there is an entire absence of proof showing or tending to show either wantonness, wilfulness or reckless disregard of the safety of others on the part of appellant's employees in charge of the engine. The judgment in this case will be reversed, and as it appears no charge of wilfulness or wantonness on the part of appellant's

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employees in charge of the engine in causing the death of appellee's decedent can be rightfully sustained, the cause will not be remanded.

Reversed with finding of facts.

Finding of facts to be incorporated in the judgment.

We find that the death of Joseph L. Owens, plaintiff's intestate, was not caused by the wilful and wanton acts of the Baltimore and Ohio Southwestern Railroad Company, appellant, as charged in the declaration.

**Robert A. Waddell, Appellee, v. John A. Noser,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Randolph county the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by Robert A. Waddell against John A. Noser to recover a broker's commission for the sale of real estate owned by defendant. The declaration was composed of two counts, one for money laid out and expended and the other for work, labor and services rendered by plaintiff in effecting a sale of said property. There was a plea of general issue and a judgment on a verdict of the jury for \$329. To reverse the judgment, defendant appeals.

The facts showed that defendant employed plaintiff to find a satisfactory exchange of his flouring mill and other vacant real estate; that plaintiff found a party by the name of Rowden who had some houses in St. Louis he was willing to exchange, and that when Rowden went with plaintiff to inspect defendant's

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property the defendant, on being informed that Rowden's houses were covered by mortgages, discontinued further negotiations and Rowden went to the station to take a train back to St. Louis. Before Rowden could get a train, defendant went to the station and made a contract with him to trade his mill for one of the houses. Rowden took the mill at a valuation of \$6,700, and in payment therefor defendant took one of the houses valued at \$9,000 subject to an incumbrance of \$3,800, leaving an equity therein of \$5,200, and a mortgage back on the mill for \$1,500, making in all \$6,700.

The theory of the defense was that plaintiff did not fulfil his contract to find defendant a buyer or a trade for the amount of the consideration agreed on; that the original negotiations were abandoned and a new trade consummated entirely different from the original, for which plaintiff was not entitled to any commission, because he was not the efficient cause of the consummation of the same; and that as plaintiff had not carried out the special contract between the parties he was entitled only to what his services were reasonably worth under a *quantum meruit*.

RALPH E. SPRIGG and J. FRED GILSTER, for appellant.

H. CLAY HORNER, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 84*—*when evidence as to value of property exchanged inadmissible*. In an action for brokerage commissions for negotiating an exchange of property, rejection of evidence offered by defendant concerning the actual value of the property taken by defendant in exchange, *held* not error where the parties put a value on the property in making the trade.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. **BROKERS, § 64***—*computation of commissions.* For the purpose of calculating an agent's commissions on an exchange of property, the property taken by the principal must be assumed to be worth the value placed upon it by the parties to the trade at the time the contract was consummated.

3. **BROKERS, § 95***—*when requested instruction properly refused.* In an action for brokerage commissions on an exchange of real estate, a requested instruction based on the theory that the contract as consummated between the defendant and purchaser was wholly different from the contract contemplated between the broker and the purchaser, the broker if entitled to recover at all could recover only on a *quantum meruit* for services rendered, *held* properly refused for the reason that the contract of exchange was not wholly different from the contract as contemplated between the broker and purchaser.

4. **BROKERS, § 64***—*when consummated contract by principal does not defeat right to commissions.* A contemplated contract entered into between a broker and a purchaser to exchange the principal's flouring mill and other real estate for three houses belonging to the purchaser, and a consummated contract later entered into between the purchaser and the principal to exchange the mill for one of the houses, *held* not to be so different as to require the broker to recover on a *quantum meruit* for his services rather than upon his express contract for commissions.

5. **BROKERS, § 95***—*when requested instruction properly refused.* A requested instruction stating a rule of law to govern the jury in case they found that the negotiations for the exchange of the properties had been abandoned by the principal and purchaser, *held* properly refused where there was no proof of any abandonment of negotiations by the parties.

6. **BROKERS, § 97***—*when requested instruction properly refused as misleading.* A requested instruction telling the jury that a person employed to make a sale of property is not entitled to a commission where he is not the efficient cause of the consummation of the transaction for which the recovery of commission is sought, *held* properly refused as misleading in the case, as tending to cause the jury to believe that plaintiff was not entitled to recover unless he had directly brought about the trade exactly as consummated.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ward v. Mississippi River Power Co., 188 Ill. App. 305.

Solomon Ward, Appellee, v. Mississippi River Power Company, Appellant.

1. **APPEAL AND ERROR, § 186***—*when freehold involved.* On appeal from a judgment in an action of trespass *vi et armis* to recover for the cutting of timber, where the general issue and pleas of *liberum tenementum* were filed, but the special pleas were ordered stricken from the files with leave to defendant to prove any matter of defense under the general issue, and the main issue was whether plaintiff owned the property on which the timber was cut, *held* that the case involved a freehold and was not reviewable by the Appellate Court.

2. **APPEAL AND ERROR, § 123***—*right of parties to confer jurisdiction when freehold involved.* Jurisdiction cannot by agreement of the parties be conferred upon the Appellate Court to review a case involving a freehold.

3. **APPEAL AND ERROR, § 131***—*duty of Appellate Court when freehold involved.* Where it is clear that a case involves a freehold, it is the duty of the Appellate Court to consider that question *sua sponte* and transfer the case to the Supreme Court.

4. **APPEAL AND ERROR, § 123***—*exceptions to rule that Appellate Court is without jurisdiction when freehold involved.* The rule that the Appellate Court has no jurisdiction to review a case involving a freehold has two exceptions: One is where the suit is commenced before a justice of the peace or in the County Court, the other is where a freehold is involved in the original judgment or decree but not in the points assigned for error.

Appeal from the Circuit Court of Madison county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1914. Transferred to Supreme Court. Opinion filed July 28, 1914.

JOHN F. MCGINNIS, for appellant.

JOHN J. BRENHOLT, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

The declaration filed in this case by Solomon Ward, appellee, was in trespass *vi et armis*, and alleged that the Mississippi River Power Company, appellant, on July 14, 1913, and at other times, with force and arms

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

against the protest of appellee, destroyed his timber growing upon certain of his lands to the value of eight hundred dollars. Appellant filed the general issue and three pleas of *liberum tenementum*. Thereafter, the court entered an order striking all the special pleas from the files and providing therein that appellant might prove any matter of defense under the plea of general issue that would be a proper defense under any proper plea. Issue was joined and the case went to trial, resulting in a verdict and judgment in favor of appellee for one hundred and fifty dollars.

Appellant did not, on the trial, deny cutting the timber but relied as a defense, and sought to show by the proof, that the land on which it was growing was its land and not that of appellee. It appeared from the proofs that appellant had purchased a strip of land sixty feet wide off of a forty acre tract of land in Madison county from a man named Runtz and that appellee had land joining this forty acre tract on the north. The controverted question on the trial was whether the strip of land which was cleared up by appellant for the use of its wires and towers, used in conveying an electric current from Keokuk, Iowa, to St. Louis, Missouri, belonged to the forty acres owned by appellee or was part of the sixty foot strip purchased by appellant from Runtz. To determine this question the testimony of surveyors and a number of other witnesses was given as to the location of the line between the two forties, as to where the division fence stood and as to how long appellee and those through whom he had claimed title had been in possession of the strip in question.

The court told the jury, among other things, in its instructions, that they should find the issues for the appellant if they believed from the evidence that appellee was not the owner of the land or that appellant owned the same. Appellant states in its brief that all the pleadings go to show the title to the premises was an

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issue in the case, and counsel for appellee also states in his brief that the paramount issue in the case was "upon whose land was the timber growing which was cut," and that this was the question submitted to the jury under the instructions of the court. Both parties would therefore appear to agree that the determination of this case involves a freehold, and the first important question which arises is whether this court has jurisdiction to review the judgment. While there is no motion by either party to dismiss or transfer the appeal for lack of jurisdiction, yet jurisdiction cannot be conferred upon this court even by agreement of parties in such a case, and if it is plain that this court has no jurisdiction, it is its duty to consider that question *sua sponte* and transfer the case to the Supreme Court, which has jurisdiction. *Aden v. Road Dist. No. 3*, 97 Ill. App. 347.

It has frequently been held by our Supreme Court that where the title to real estate is put in issue by the pleadings and a decision of the case involves a decision of that issue, a freehold is involved. *Douglas Park Bldg. Ass'n v. Roberts*, 218 Ill. 454, and cases cited. Mr. Justice Cooke in the opinion delivered by him in the case of *Jones v. Sanitary Dist. of Chicago*, 252 Ill. 591, says: "We have repeatedly held that when a freehold is so put in issue that a decision of the case necessarily involves a decision of that question, this court has jurisdiction on direct appeal," and a number of cases are cited by him in support of this rule. It is also well established in this State that where, in a case of trespass *quare clausum fregit*, there are pleas of general issue and *liberum tenementum* filed, a freehold is necessarily involved and the Supreme Court alone has jurisdiction on appeal. *Douglas Park Bldg. Ass'n v. Roberts*, *supra*; *Piper v. Connelly*, 108 Ill. 646; *City of Alton v. Fishback*, 81 Ill. App. 86.

It is true that in this case the Court struck from the files the pleas of *liberum tenementum*, but in doing so he entered the order above referred to, allowing de-

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fendant to make any defense that might properly be made under any proper plea, and the case appears to have been tried on the same theory as though such pleas had been filed, and it must be so treated here. This court held in *McDowell v. Jones*, 106 Ill. App. 473, that in an action of trespass *quare clausum fregit*, where the only material question tried was the ownership of the premises in question, a freehold was directly involved and that the appeal should have been taken to the Supreme Court. There are two exceptions to the general rule above laid down, however, and these are: First, where the suit is commenced before a justice of the peace or in a County Court in which case the appeal must be taken to the Appellate Court. This question is discussed somewhat at length and numerous authorities cited in *Boyd v. Kimmel*, 244 Ill. 545. That case originated in the County Court, and an appeal was taken therefrom to the Appellate Court and the case was later transferred by the Appellate Court to the Supreme Court on the ground that a freehold was involved. The Supreme Court stated in its opinion that if the County Court had jurisdiction to try the title to the disputed real estate in question and to establish a proper boundary line between the litigants, then the appeal should have been taken to the Supreme Court, and if the County Court did not have jurisdiction to try a case involving a freehold and render a judgment that would be binding upon the parties to the title, the appeal was properly taken to the Appellate Court; and it was held by the court that the County Court did not have jurisdiction to try a case involving a freehold and render a judgment binding as to the title and therefore the appeal was properly taken from that court to the Appellate Court. In that case the court also approves the doctrine laid down in *Pitts v. Looby*, 142 Ill. 534, and *Cobine v. McKittrick*, 186 Ill. 324, that an action for damages to real property

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commenced before a justice of the peace is different from an action of trespass *quare clausum fregit* commenced in the Circuit Court, because the justice of the peace has no jurisdiction to try title to real estate and the question of freehold can only be incidentally involved, and therefore appeals from the trial courts, to which such justices' cases may be taken, should be to the Appellate Court and not to the Supreme Court. The other exception is where a freehold is involved in the original judgment or decree but not in the points assigned for error, in which case the appeal should be taken to the Appellate Court. *Prouty v. Moss*, 188 Ill. 84; *Franklin v. Loan & Investment Co. of North America*, 152 Ill. 345.

In this appeal it was argued by counsel on both sides, and such argument was proper under the errors assigned, that appellee having attempted to show ownership by adverse possession, the title to the land in question was the principal issue to be determined. It will therefore be seen that according to the rules laid down in the above authorities the question of freehold was involved not only upon the trial of this cause in the Circuit Court, but also upon this appeal and therefore the appeal should have been taken directly from the Circuit Court, where the suit originated, to the Supreme Court.

The clerk of this court will accordingly be directed to transmit the transcript in this case and all the files herein, together with the order of transfer, to the clerk of the Supreme Court.

Transferred to Supreme Court.

Ida Jefferies, Appellee, v. A. J. Alexander et al., Appellants.

(Not to be reported in full.)

Appeal from the Circuit Court of Marion county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this Court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by Ida Jefferies against A. J. Alexander, L. E. Kammier, Edward E. Kell, August Langenfeld and others either found not guilty or dismissed out of the case, under the Dramshop Act, to recover damages on account of the death of plaintiff's husband, Newton Jefferies, alleged to have resulted from his habitual intoxication brought on by the sale of intoxicating liquors to him by the defendants after plaintiff had served notice on them not to sell or give him intoxicating liquors. There was a plea of the general issue and a verdict and judgment in favor of plaintiff. To reverse the judgment, defendants appeal.

W. H. NELMS, F. P. DRENNAN and NOLEMAN & SMITH, for appellants.

BUNDY & WHAM and L. B. SKIPPER, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 225*—*when evidence tends to prove death by delirium tremens.* In an action by a wife for damages resulting from her husband's intoxication produced by a sale of liquor to him by the defendants, where the declaration alleged that the husband died of delirium tremens, *held* that there was evidence tending to show that he died of such affliction, where it was undis-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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puted that he was in a highly delirious state and was seeing and doing things commonly supposed to attend an attack of delirium tremens; but also *held* that under such conditions it was immaterial whether the delirium was properly named in the declaration or not, the proofs plainly showing a case in which plaintiff was entitled to recover.

2. INTOXICATING LIQUORS, § 208*—*when evidence to show existence of former wife of husband inadmissible.* In an action by a wife under the Dramshop Act to recover damages resulting from her husband's intoxication alleged to have been produced by the sale of liquor to him by the defendants, evidence offered to show that the husband had a wife living by a former marriage, and a decree of divorce obtained by such wife from the husband which defendants claimed was void for the reason that it failed to state that the complainant in the divorce suit was a resident of the county in which the suit was brought, *held* properly rejected on the ground that the decree could not be collaterally attacked.

3. INTOXICATING LIQUORS, § 249*—*when instruction in language of statute not misleading.* In an action brought by a wife under the Dramshop Act to recover damages resulting from the sale of intoxicating liquors to her husband, the giving of an instruction purporting to contain all the words of the statute, but omitting some portions immaterial to the case, *held* not misleading so as to constitute reversible error where other instructions given properly limited the damages to the injury sustained by plaintiff in her means of support.

4. DIVORCE, § 64*—*when decree cannot be collaterally attacked.* A decree of divorce cannot be attacked in a collateral proceeding for the reason that the decree did not state the complainant in the divorce suit was a resident of the county in which the suit was brought.

5. APPEAL AND ERROR, § 1514*—*when remarks of counsel not prejudicial.* Improper remarks of plaintiff's counsel in his argument to the jury *held* not of such material importance as to warrant a reversal of the judgment.

McBRIDE, J., having tried this case in the court below, took no part in this decision.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hahn v. Schnell, 188 Ill. App. 312.

**Charles J. Hahn, Appellee, v. Pauline Schnell,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Clinton county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by Charles J. Hahn against Pauline Schnell and Carlyle Schnell in trespass. The declaration charged the defendants with turning on the dwelling house of plaintiff and into the open doors and windows thereof large streams of water with great force and violence thereby injuring the plaintiff, disturbing his peace of mind and damaging his property. There was a plea of not guilty and a verdict in favor of plaintiff for nine hundred dollars followed by a judgment for a like amount. To reverse the judgment, Pauline Schnell alone appeals.

The facts show that Pauline Schnell owned the house in which the plaintiff was living as a tenant at Carlyle, Illinois; that there had been some difficulty over the rent and that she and her son, Carlyle Schnell, resided in Missouri. The son and the mother returned to Carlyle and the son had a conversation with one Shade and one Thalls about a little job he wanted done. They went into a saloon and after taking several drinks Shade and Thalls agreed to "take the chance," and on the night in question secured a hose from the city hose house and attached it to a city hydrant near where plaintiff resided and the three men directed the hose towards the windows causing a dirty stream of water to be thrown into the house.

Appellant claims that the proofs failed to show she was in any way connected with the offense complained

of; that there was error in plaintiff's third instruction and in the courts ruling on certain evidence.

The third instruction complained of is as follows:

“The court further instructs that if you believe from a preponderance of the evidence in this case that David Shade and Thomas Thalls wilfully and maliciously entered the premises occupied by the plaintiff in the nighttime, and turned a stream of water from a hose, connected with the city hydrant, upon the dwelling house occupied by the plaintiff and through the open window of said house upon the person of the plaintiff, as charged in the declaration, and if you further believe, from the evidence, that said David Shade and Thomas Thalls were procured or employed to do said unlawful act by the defendant Carlyle Schnell, and that he stood by and aided and abetted them in the perpetration of the same, and if you further believe from the evidence that the defendant, Pauline Schnell, was the owner of the dwelling house in question, and that with a view of procuring possession of the same or forcing the plaintiff and his family to vacate the dwelling house, she was present or stood by and aided, abetted or encouraged the said Carlyle Schnell in the commission of said unlawful acts, or if you believe from the evidence that the said Pauline Schnell not being present had knowledge of what was about to be done, and had advised, encouraged, aided or abetted the said Carlyle Schnell to attempt to dispossess the plaintiff and secure possession of said dwelling house by the commission of the act done, then both the defendants, Carlyle Schnell and Pauline Schnell, are liable for the unlawful acts of the said David Shade and Thomas Thalls.”

FORD & JONES and WILLIAM JOHNSTON, for appellant.

NOLEMAN & SMITH and H. G. WEBER, for appellees.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Hahn v. Schnell, 188 Ill. App. 312.

Abstract of the Decision.

1. TRESPASS, § 49*—*when finding of guilty against joint defendant sustained by the evidence.* In trespass against two defendants charging them with turning large streams of water with force and violence through the open doors and windows of plaintiff's dwelling house, where it was not disputed that one of the defendants and two other persons committed the act charged, but the other defendant, who was the mother of the codefendant, denied having aided or abetted in the commission of the act charged, *held* that a verdict finding both defendants guilty was sustained by the evidence.

2. TRESPASS, § 55*—*when giving of argumentative instruction not reversible error.* In an action of trespass charging a son and mother with turning a large stream of water upon and into plaintiff's dwelling house, an instruction given for plaintiff which in part stated that if the mother "was the owner of the dwelling house in question, and with a view of procuring possession of the same or forcing the plaintiff and his family to vacate the dwelling house, she was present or stood by and aided, abetted, etc.," then she was liable with the other defendant, *held* objectionable as argumentative in setting forth a reason why the mother might have desired or been led to assist her son in his unlawful assault, but *held* that regardless of any reason which may or may not have actuated her to have assisted said offense, the instruction set forth the law applicable to the case and that the argumentative portion would not warrant a reversal.

3. TRESPASS, § 48*—*admissibility of evidence.* In trespass against two defendants for turning water upon and into plaintiff's dwelling house, exclusion of evidence offered to show that one of the defendants had paid out large sums for fines and costs for the same act and that the wife of the plaintiff had previously recovered a judgment against him, *held* proper.

4. APPEAL AND ERROR, § 1213*—*when errors not affecting appellant cannot be complained of.* In trespass against two defendants for turning water upon plaintiff's dwelling house, exclusion of evidence offered to show that one of the defendants had paid out large sums for fines and costs for the same act and that the wife of the plaintiff had previously recovered a judgment against him cannot be complained of by the other defendant on appeal by her alone, as such action of the court did not in any manner concern plaintiff's right of action against her.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ballance v. City of Granite City, 188 Ill. App. 315.

Thomas M. Ballance, Defendant in Error, v. City of Granite City, Plaintiff in Error.

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by Thomas M. Ballance against City of Granite City to recover for personal injuries alleged to have been caused by the negligence of the defendant in permitting a sidewalk to remain in an unsafe condition. The jury returned a verdict in favor of plaintiff for \$2,091, and judgment was entered on the verdict. To reverse the judgment, defendant prosecutes a writ of error.

The error argued for reversal is that the verdict is manifestly against the weight of the evidence.

D. J. SULLIVAN and M. R. SULLIVAN, for plaintiff in error.

DAN MCGLYNN, for defendant in error.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 1085*—*burden of proof*. In an action against a city for personal injuries alleged to have resulted from the negligence of the city in permitting its sidewalk to remain out of repair, the burden is upon the plaintiff to show, by a preponderance of the evidence, that the sidewalk was out of repair at the time of the accident and for a sufficient length of time prior thereto to give the city notice thereof, actual or constructive; that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the city had notice of the accident as provided by statute; that plaintiff at the time of the accident was in the exercise of due care; and that he was injured and the extent thereof.

2. MUNICIPAL CORPORATIONS, § 1098*—*when verdict for injuries resulting from defective sidewalk sustained by the evidence.* In an action against a city for personal injuries sustained by plaintiff by tripping and falling by reason of the defective condition of a sidewalk which it was alleged the defendant negligently permitted to remain out of repair, a verdict for plaintiff on conflicting evidence held not against the manifest weight of the evidence.

Frank Deason, Appellee, v. County of Williamson, Appellant.

1. ASSUMPSIT, ACTION OF, § 33*—*when common counts proper to recover for services under Pauper Act.* A physician who has treated paupers and cyclone sufferers under the Pauper Act, J. & A. ¶¶ 8355 et seq., is entitled to recover from the County for such services under the common counts.

2. PAUPERS, § 25*—*right of physician to recover for aid to persons not paupers.* To entitle a physician to recover under section 24 of the Pauper Act, J. & A. ¶ 8378, for treatment of cyclone sufferers, he must show that those treated did not come within the definition of paupers, that they were injured or had fallen sick and that they have neither money nor property to pay for medical aid.

3. APPEAL AND ERROR, § 1506*—*when refusal to permit cross-examination of plaintiff reversible error.* In an action by a physician to recover from the County for treatment of paupers and cyclone sufferers, refusal to permit cross-examination of plaintiff to show that other physicians had performed some of the services sued for and what the arrangement was between them, held reversible error.

4. PAUPERS, § 22*—*when instruction improper.* In an action by a physician against the County to recover for treatment of paupers and also for treatment of cyclone sufferers, an instruction given for plaintiff which directed a verdict and told the jury as a matter of law that if they believed the services were ordered by the overseer of the poor the plaintiff would be entitled to recover, held erroneous as authorizing the jury to return a verdict for the claims without stating the necessary elements to entitle plaintiff to recover.

5. PAUPERS, § 25*—*when instruction on right of physician to recover for treatment of cyclone sufferers erroneous.* An instruction

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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based on the right of a physician to recover from the County for the treatment of cyclone sufferers, *held* erroneous where it does not include the element that the parties treated were without means to pay for the medical aid.

6. PAUPERS, § 22*—*when instruction on right of physician to recover for treatment erroneous.* An instruction based upon the right of a physician to recover from the County for treatment of paupers and cyclone sufferers which told the jury that if the supervisor employed plaintiff to render medical aid to the parties mentioned in the suit, the plaintiff would be entitled to recover a fair and reasonable compensation for his services, *held* erroneous.

Appeal from the Circuit Court of Williamson county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed July 28, 1914.

D. T. HARTWELL and GEORGE R. STONE, for appellant.

NEELY, GALLIMORE, COOK & POTTER, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

The appellee, a physician, a resident of Bush, Williamson County, brought this suit for professional services rendered to paupers, and for professional services rendered in an emergency case, following a cyclone passing through the village of Bush, April 21, 1912, and to recover therefor filed his declaration consisting of the common counts.

The defendant filed thereto the general issue. A trial upon the issues resulted in a verdict and judgment for the sum of \$289, from which this appeal is prosecuted.

Appellant contends that this verdict is excessive, admitting liability to the amount of \$156. The right to recover in this suit is based upon two sections of the statute. The first, waiting upon Mabel Minor and Florence Lewis, paupers. (Sections 18 and 20 of chapter 107, R. S., J. & A. §§ 8355, 8362, 8372.) The

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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second, for waiting upon the cyclone sufferers under section 24 of the same chapter. (J. & A. ¶ 8378.)

It is contended by appellant that there could be no recovery as to the Minor and Lewis claims except for the services after the supervisors had been notified of their condition and authorized treatment. Appellant insists there can be no recovery for treatment of cyclone victims because, under the common counts, an expressed or implied promise to pay or an expressed or implied request to perform services is essential to a recovery.

Appellant insists that error was committed in the admission of evidence and restriction of cross-examination of appellee; that the court committed error in the giving of appellee's instructions 2, 4 and 6.

The statute upon which appellee proceeds is a humane provision of the law for the protection of the unfortunate where they prove to be paupers, and where they are not paupers but where in an emergency they are unable to take care of themselves. However, the existence of such provisions of the law does not mean that a generous people in providing such a law are not to be protected in having those charged with the performance of duty under the law, before they can recover, perform it, in the manner and the way the law provides. In other words, where certain powers and rights are delegated to certain persons by the Legislature to appropriate to their own use funds out of the public treasury, they must do it within the law and according to law. From an examination of the record in this case on account of the refusal of the court to permit a cross-examination of appellee upon the question of his interest in the subject-matter of the suit and the giving of the instructions 2, 4 and 6 for appellee this cause must be reversed for another trial, the facts will not be discussed except to dispose of these questions.

A recovery may be had under the two sections of the statute involved under the common counts where the facts authorize a recovery. Under the section of the statute which appellee seeks recovery for treatment of Mabel Minor and Florence Lewis, they must be shown to be paupers, and treated under the direction of the supervisor or after notice to the supervisor of their condition and with his acquiescence to raise either an expressed or implied promise to pay. This would not operate to bind the County to pay for treatment administered prior to such time. *County of Clinton v. Pace*, 59 Ill. App. 580.

Under section 24 of the Pauper Act (J. & A. ¶ 8378), appellee was authorized to treat the cyclone sufferers where prompt and immediate action is required without notice to or permission from the supervisor. To entitle appellee to recover under this section he must show:

First. That those treated did not come within the definition of pauper; second, that they were injured or had fallen sick; third, that they have neither money nor property to pay for medical aid. *County of Clinton v. Pace*, 59 Ill. App. 577.

It is always necessary for the party seeking to recover to show that the cause of action belongs to him, and a cross-examination of a party as to his interest in the money to be recovered is proper and it is error to deny. Where it was sought on cross-examination of appellee to show that other physicians had performed some of the services charged for by appellee and what the arrangement was between them was proper and the denial was error.

The evidence in this case called for a finding of the jury on the question of when the supervisor was first notified and permitted the Minor and Lewis treatment, and who treated the cyclone sufferers and what was a reasonable charge therefor.

It would follow that the admission of evidence upon these issues should be free from error and the jury

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accurately instructed. It is true instructions were given for appellant defining the issues under these two sections of the statute, but when read with appellee's given instructions 2, 4 and 6 they are in conflict therewith and misleading. Appellee's given instruction number 2 directs a verdict and tells the jury as a matter of law that if they believe the services were ordered by the overseer of the poor that appellee would be entitled to recover a reasonable and fair compensation for the services rendered. It includes services rendered or claimed by appellant to have been rendered even prior to notice in the Minor and Lewis claims; and also that the order would include a right to recover for treatment of cyclone sufferers.

This instruction would authorize the jury to return a verdict for all these claims they believed fair and reasonable without the necessary elements to entitle a recovery and should not have been given.

Appellee's instruction number 4 is based upon the right to recover for treatment of cyclone sufferers without permission of the supervisor, and should have included the elements that an emergency existed and that the party injured had no property or means to pay for medical aid, and because the instruction did not include, "That the parties treated were without means to pay for the medical aid," this instruction should not have been given.

The complaint as to the giving of appellee's instruction number 6 for the reasons given as to appellee's number 2 and for the further reason that it told the jury that if the supervisor employed appellee to render medical aid to the parties mentioned in this suit, he would have a right to recover a fair and reasonable compensation for services so rendered.

The parties mentioned in the evidence included parties who were treated under a different section of the statute, and this instruction gave the jury the oppor-

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tunity to find under the law that if the supervisor had been spoken to about the treatment of Minor and Lewis and had so directed treatment without any further showing, that would bind the County as to treatment of cyclone sufferers. This instruction should not have been given.

We think the errors in the admission of evidence and the giving of instructions go to the merits of the case, and the judgment will have to be reversed and cause remanded.

Reversed and remanded.

Angelique Huchette, Administratrix, Appellee, v. Williamson County Coal Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Williamson county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1913. Reversed with finding of fact. Opinion filed July 28, 1914.

Statement of the Case.

Action by Angelique Huchette, administratrix of the estate of J. B. Huchette, deceased, against the Williamson County Coal Company to recover for the death of the deceased resulting from a stone falling from the roof of a mine upon him while employed to go into the mine and extinguish a fire. The declaration consisted of four counts, all of which charged common-law negligence.

The first count alleged that the defendant carelessly and negligently failed to prop its roof; that defendant knew of its dangerous condition or could have known of it; that plaintiff's deceased did not know of such dangerous condition, and did not know of the dangers

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consequent to improperly propping roof and did not have equal means of knowing with defendant. The second count that said roof was insufficiently propped and same as first count. The third count that the roof was insufficiently propped and that deceased was carelessly and negligently sent into cross cut to assist in extinguishing fire, the escaping of steam and loosening of rock, etc. The fourth count same as third, negligent order, unsafe place to work, etc.

All of said counts charged that the deceased while he was in the exercise of due care was killed by and through the negligence of defendant to the damage of the plaintiff in the sum of ten thousand dollars. A plea of not guilty was filed and an issue joined thereon. From a judgment entered on a verdict in favor of plaintiff for fourteen hundred dollars, defendant appeals.

DENISON & SPILLER, for appellant; MASTIN & SHERLOCK, of counsel.

NEELY, GALLIMORE, COOK & POTTER, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. MINES AND MINERALS, § 148*—*burden of proof in suit for death of miner.* In an action against a mining company to recover for the death of a miner resulting from the fall of a stone from the roof of a mine, *held* under the averments of the declaration the burden was upon the plaintiff to prove by a preponderance of the evidence that the deceased while in the exercise of due care and caution was injured by defendant's failure to use reasonable care to furnish deceased with a reasonably safe place to work; that at the time of the accident he was acting under and in obedience to a special order; that the danger was known to defendant or could have been known by the exercise of reasonable care; that deceased

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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did not know of the danger and that he was free from the negligence which contributed to the injury.

2. **MINES AND MINERALS, § 173***—*when recovery for death of miner not sustained by the evidence.* In an action against a mining company to recover for the death of a miner resulting from the fall of a rock from the roof of a mine, where the declaration alleged defendant was guilty of common-law negligence in failing to prop the roof, *held* that a verdict in favor of plaintiff could not be sustained for the reason that the evidence showed that the deceased was not in the exercise of due care for his own safety, it appearing that deceased was taken from the place where he was injured to a place of safety and directed to keep out, and that he returned to the place he was injured in violation of the directions.

3. **APPEAL AND ERROR, § 1411***—*when verdict may be set aside.* A verdict on conflicting testimony may be set aside as against the weight of the evidence where the verdict is based on the testimony of one witness, which was denied by three others, and all the circumstances and inferences to be drawn from the evidence corroborated the three witnesses.

4. **APPEAL AND ERROR, § 1802***—*when judgment may be reversed without remandment.* Where a verdict upon which a judgment was entered is without sufficient evidence to support it and the case has been tried twice in the lower court, and it appears from the record that all the facts material to the issue have been brought forward to both parties and that a new trial would serve no good purpose, the case will be reversed with a finding of fact.

J. H. Bayer, Appellee, v. St. Louis, Springfield and Peoria Railroad, Appellant.

1. **STREET RAILROADS, § 152***—*when refusal of requested instruction reversible error.* In an action against a street railway company for damages to plaintiff's auto truck alleged to have been caused by defendant's street car colliding with it at a street intersection, refusal of an instruction offered by defendant which told the jury that if they believed that plaintiff's driver drove the truck against the side of defendant's car, and that in so doing they believed he was guilty of negligence contributing to the accident, they

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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should find for defendant, *held* reversible error for the reason that the instruction stated the law applicable to the case and was not covered by other instructions.

2. DAMAGES, § 190*—*sufficiency of proof of amount*. Though proof of damages by plaintiff's testimony alone, which is indefinite, as to the amount may not be grounds for reversal of the judgment, it is an unsatisfactory way of proving damages where with care the amount could be ascertained with reasonable certainty.

Appeal from the Circuit Court of Madison county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed July 28, 1914.

RICHARD YATES and H. C. DILLON, for appellant;
GEORGE W. BURTON, of counsel.

C. H. BURTON, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

The declaration filed in this case consisted of one original count and an additional count called the first and second counts. The first count, in substance, avers that on June 15, 1912, appellant possessed and operated a certain electric railroad through the city of Venice and village of Madison and was operating by and through its servants a certain car from the north towards the south upon State street in the city of Venice at and near an intersection with Market street, both being public streets, and appellee then and there with due care for his own safety was riding in an auto truck upon Market street going from east towards the west and towards said intersection lines with State street; that appellant by and through its servants in charge of said car negligently and improperly drove and operated said car so that it struck with great force and violence the auto truck in which appellee was riding and by means whereof the auto truck, then and there the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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property of appellee, was crushed, damaged and injured to the amount of seven hundred and fifty dollars.

The second count avers, in substance, the same as the first count, and that there was then and there in force in the city of Venice a certain ordinance limiting the speed of electric cars on State street to not more than fifteen miles per hour, and that the appellant negligently and improperly drove said car at a speed in excess of fifteen miles per hour, and by reason thereof appellee while in the exercise of due care and caution riding in the auto truck was struck by said car with great force and violence and his, appellee's, auto truck crushed, damaged and injured, etc.

The general issue was filed by appellant to the declaration. Upon a trial the jury found appellant not guilty under the second count of the declaration, at the close of evidence offered by appellee under the instruction of the court. The trial proceeded under the first count of the declaration and the jury found the appellant guilty and assessed appellee's damages at three hundred dollars. Upon motion for a new trial the appellee entered remittitur of the sum of fifty dollars. Motion for a new trial was overruled and judgment entered for the sum of two hundred and fifty dollars.

The facts in this case as they appear from the record show: That appellee with his driver and two other workmen in an auto truck started west on Market street about one hundred and fifty feet east of the intersection of said Market and State streets, the place where the accident occurred. The auto was being run at the time on second speed; that the view to the north on State street at the intersection was obstructed until the car would be within about twenty feet of the intersection; that a collision occurred between the electric car and auto is not a matter of dispute; that it was at a street crossing much used by the public is established by the evidence. The circumstances tending to show

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due care and caution of appellee and negligence of the Company were the questions of fact upon which there was a sharp conflict of the evidence to the extent of four or five witnesses on each side. The credibility of some of the witnesses was attacked and all submitted to the jury.

Appellant relies upon three propositions to reverse this case:

First. That the driver of appellee's auto truck was guilty of contributory negligence and appellee under the facts cannot recover.

Second. That appellant was entitled to have its refused instructions 1, 2 and 3 given and the refusal of the court to give them is reversible error.

Third. That the verdict of the jury was excessive and that error was not cured by remittitur.

The first proposition argued by appellant, excerpts from the testimony of a number of witnesses quoted and from an examination of the record of the evidence of physical conditions, conduct of servants of appellant in running the car and the conduct of appellee while approaching the crossing, made the case close upon the facts, with evidence tending to support a finding of the jury, whatever it might be, and at the same time call upon the court to apply the law with greater accuracy.

The merit of the contention of appellant is covered by the second proposition. It appears from the record, without contradiction, that appellant's refused instructions numbers 1, 2 and 3 were presented by appellant to the court and refused, and that each one of them correctly stated a proposition of law applicable to the case is not denied. It is, however, insisted by appellee that the same proposition was covered by other given instructions for appellant. The first of said instructions is, as follows:

The Court instructs the jury, that if you believe from the evidence that plaintiff's driver on the occasion in question, drove the auto truck, owned by the plaintiff,

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against the side of defendant's car, and that in doing so, if you so believe, he was guilty of negligence contributing to the accident, then you should find the defendant not guilty."

That the above instruction states the law applicable to this case is not denied or argued by appellee, and leaves to be determined whether or not appellant's defense of a failure on the part of appellee to exercise due care and caution has been submitted to the jury as it has a right to have it submitted.

The declaration charged by reason of the negligence of the servants of appellant, while the appellee was in the exercise of due care, that appellant's car was with force and violence run against appellee's auto, and appellant answers by the evidence of two or more witnesses and the marks on the car that appellee ran his auto into the side of appellant's car, which evidence tended to prove the defense, and if believed by the jury might sustain the jury in a finding that appellee was not in the exercise of due care; that a fair presentation of this issue to the jury is necessary under the pleadings and facts and any error by reason of which the jury was deprived of either the law or the facts applicable thereto goes to the merits of the case and is reversible error.

Appellee says this proposition was covered by other instructions, particularly numbers 1, 5, 7, 8 and 9 given for appellant. After a careful reading of appellant's instructions the most that can be said is that the jury were told; "That unless the jury believe the plaintiff was in the exercise of due care and if by the exercise of reasonable and ordinary care on his part could and would have kept out of the way of the car and thus have avoided the collision," he could not recover.

The instructions referred to were abstract in character of the law on due care and caution so frequently mentioned, and particularly in the case of *Carlin v. Grand Trunk Western Ry. Co.*, 243 Ill. 64.

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The instruction offered contained the law as to a state of facts which was supported by the evidence, which if found to be true by the jury would defeat a recovery, and of which appellant in no other given instruction had the benefit thereof and should have been given and it was reversible error to refuse. The third proposition might not, standing alone, call for a reversal of this case, but as it must be reversed all that will be said is that appellee's evidence is the only evidence upon the measure of damages and he cannot definitely state how much his damages were, but about two hundred and fifty dollars, may be more and might have been less, which is an unsatisfactory way of proving damages of this kind, where with care the amount could be ascertained with reasonable certainty.

For the error in refusing this instruction the judgment will be reversed and cause remanded.

Reversed and remanded.

**Essa Russell, Appellee, v. O'Gara Coal Company,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Saline county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by Essa Russell against O'Gara Coal Company to recover for the death of her husband, Thomas Russell, resulting from the fall of the roof of defendant's mine.

The declaration consists of three statutory counts, the first charging a demand for props from the mine manager and a failure to furnish suitable props. The

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second count charges a custom and practice adopted in mines and known and recognized by defendant, whereby the diggers would order props, caps and timbers from the timberman, and that plaintiff's deceased so ordered but that defendant wilfully failed to provide them. The third count charges a dangerous condition in the room where plaintiff's deceased was required in the exercise of his duties to be, consisting of loose slate, rock and other substances forming a part of the roof of said room, and that defendant knew of this dangerous condition or could have known thereof; that defendant allowed Thomas Russell to enter said room and to work therein without the direction of the mine manager before the said dangerous condition had been made safe; that in each of said counts it is alleged by reason thereof Thomas Russell was injured from which injuries he died, and that plaintiff as his surviving widow has been damaged, etc. To each of the counts the general issue was filed, upon which a trial followed, and a verdict of the jury returned finding defendant guilty and assessing plaintiff's damages at two thousand dollars. From a judgment entered on the verdict, defendant appeals.

M. S. WHITLEY, for appellant.

RONALDS & DODD and CHOISSE & KANE, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. MINES AND MINERALS, § 89*—*duty to furnish sufficient props.* The fact that the miner has unused props will not relieve the mining company of the duty to furnish props of suitable length.

2. MINES AND MINERALS, § 89*—*effect of ordering props before they are needed.* The fact that a miner orders props before they are

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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needed, *held* not to relieve a mining company from liability to furnish them.

3. MINES AND MINERALS, § 89*—*right of miner to continue work after demand for props.* The fact that a miner, with knowledge of the dangerous condition of the roof of the mine, continued to work two days after props were ordered from the timberman, does not charge him with contributory negligence or with assuming the risk, where there was a custom for the timberman to receive orders for props, and he was charged with knowledge of the dangerous condition of the mine and permitted the miner to work without the direction of the mine manager.

4. MINES AND MINERALS, § 90*—*when company bound by custom of timberman to furnish props.* Where a mining company has adopted and recognized a custom whereby a miner orders props, caps and timbers from the timberman and has the timberman measure and determine the length of suitable props, it is bound by such custom and the timberman becomes a vice-principal, and his knowledge and neglect of duty is that of the company.

5. MINES AND MINERALS, § 187*—*when instruction not misleading.* In an action against a coal mining company for the death of a miner alleged to have resulted from the failure of defendant to provide props, caps and timbers, an instruction given for plaintiff which undertook to set out what was necessary to prove under a count in the declaration, *held* not misleading, for the reason that the declaration referred to caps and timbers while the evidence was with reference to props, there being undisputed evidence that props, caps and timbers are inseparable.

Henry Still et al., Executors, Appellees, v. Edward Still, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. LOUIS BERNREUTER, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by Henry, James and Charles Still, executors of the estate of Ann Still, deceased, against Edward

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Still v. Still, 188 Ill. App. 330.

Still in forcible detainer to recover the possession of certain lands occupied by the defendant under a lease from the deceased. The suit was originally brought before a justice of the peace, from whose judgment an appeal was taken to the Circuit Court where plaintiffs had judgment. To reverse the judgment, defendant appeals.

The facts show that Thomas Still owned the premises in his lifetime and that on his death devised the same to his wife, Ann Still; that the defendant at the time of the death of Thomas Still was occupying the premises and had occupied them for twenty-five years prior thereto under some arrangement, and that after the probate of the will continued to occupy them; that Ann Still brought a forcible detainer suit against him for possession and rent and recovered a judgment; that afterwards the defendant desiring to keep the farm agreed upon a settlement of the judgment and his mother, Ann Still, executed a lease to him for a year, which failed to properly describe the land; that defendant paid one-half the rent and refused to surrender possession at the end of the year, whereupon this suit was brought.

Defendant urges as ground for reversal: First, that the lease was procured by threats and intimidation; second, that the description in the lease does not describe the land occupied by defendant; and third, that Ann Still never had possession or the right of possession to the premises in controversy.

JOHN J. BRENHOLT, for appellant.

C. H. BURTON, for appellees.

MR. JUSTICE HARRIS delivered the opinion of the court.

The Carson-Payson Co. v. Moore, 188 Ill. App. 332.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 42*—*when lease not avoided by threats or intimidation.* To avoid a lease on the ground it was procured by threats or intimidations, the threats or intimidation must be present and operative at the time of signing the instrument and such as to destroy the complaining party's free agency and make his act not his own but the act of another.

2. FORCIBLE ENTRY AND DETAINER, § 24*—*when misdescription in lease no defense.* A misdescription of the premises in a lease is properly explained as a mistake and will not defeat recovery in an action of forcible detainer, where the tenant says the premises he occupied were the same as involved in the suit.

3. LANDLORD AND TENANT, § 132*—*when tenant estopped to deny landlord's title or right to possession.* A tenant who has taken a lease and paid rent to the lessor as landlord is estopped from either questioning his title or right to possession so long as he remains his tenant.

The Carson-Payson Company, Appellee, v. Lida Moore et al., Appellants.

1. MECHANICS' LIENS, § 68*—*computation of time for giving subcontractor's notice for lien.* Where a company under a contract with the original contractor delivers materials to a common carrier to be shipped to the contractor, its contract with the contractor is completed on the date of the delivery to the carrier, and in order to entitle it to a mechanic's lien it must give notice to the owner within sixty days from such date.

2. APPEAL AND ERROR, § 528*—*when propositions of law unnecessary to preserve question of law for review.* The rule that where the facts are not in dispute and only a question of law is to be determined, such question cannot be reviewed unless propositions of law have been presented to the trial judge, does not apply to a chancery case.

Appeal from the Circuit Court of Wabash county; the Hon. WILLIAM H. GREEN, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded with directions. Opinion filed July 28, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Carson-Payson Co. v. Moore, 188 Ill. App. 332.

E. B. GREEN and THEO. G. RISLEY, for appellants.

HOWARD P. FRENCH, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

The appellee, a corporation of Danville, Illinois, filed its bill in chancery against appellant and others to enforce a mechanic's lien against certain real estate described in the bill. The bill describes appellee as a sub-contractor, under a contract with the original contractors, Struby & Harris, to furnish radiators and a boiler put upon the premises of appellants, and avers notice to appellants.

To the bill appellants filed their answer, denying the furnishing of material due and denying that a sufficient notice was served to subject the premises to the lien sought or to make them liable as the owners of the premises. Replication filed by appellee, the taking of testimony before the master in chancery, report of evidence.

Upon the hearing before the court the issues were found with appellee, and the sum of \$401.76 to be due, and if not paid within thirty days the master in chancery is directed to sell the premises of Benjamin F. Moore, one of appellants, to satisfy the amount due and costs. Benjamin F. Moore excepts and brings this appeal.

The facts, so far as they are material to a decision of this case, appear to be that Struby & Harris on the twenty-eighth day of July, 1910, entered into a contract with Benjamin F. Moore, appellant, to furnish all material and construct a heating plant on the premises in said bill described for the sum of \$514; that on the fifth day of August, 1910, appellee entered into a contract with Struby & Harris to furnish of said material one steam boiler and thirty Kewanee steam radiators to be used in pursuance of said original contract in

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said building; that on the fifth day of August, 1910, at Kewanee, Illinois, and on the ninth day of August, 1910, at Geneva, New York, waybills were issued showing a delivery of all of said articles to a common carrier billed to Struby & Harris, Mt. Carmel, Illinois; that on the tenth day of October, 1910, notice was served by appellee upon appellants claiming and asserting a lien upon the premises described in the bill under the mechanic's lien law of this State, the law referred to being that of Mechanics' Liens Act, ch. 82, sec. 24, (J. & A., ¶ 7162), which reads, as follows: "Sub-contractors * * * may at any time after making their contracts * * * and shall, within sixty days after completion thereof * * * cause a written notice of the claims * * * to be personally served on the owner."

The facts in this case are not in dispute, as the case was heard upon the evidence of complainant. The statute is derogatory to the common law, mandatory and must be strictly complied with or no lien exists. The statute was evidently passed for protection of the owner and all parties entitled to a lien so that the one could not be deprived of his money, and that the owner would not be compelled to pay twice. The statute wisely provided that the time in which the party who anticipated claiming a lien should act.

The delivery by appellee or their agents at Kewanee, Illinois, and Geneva, New York, upon the fifth and ninth days of August, 1910, respectively, under the contract between appellee and Struby & Harris to the common carriers billed to Struby & Harris, Mt. Carmel, Illinois, was a delivery to Struby & Harris, and completed the contract upon the part of appellee. *City of Carthage v. Duval*, 202 Ill. 237.

The contract of appellee being complete on the ninth day of August, 1910, a notice to entitle appellee to a lien must be served within sixty days from that date. The notice served on the tenth day of October,

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1910, did not come within the time fixed by law, and was insufficient.

The evidence in this case, considered for all purposes as it applies to the issues, leaves no question of fact to be determined.

It is urged by appellee that where the facts are not in dispute and only a question of law is to be determined, that if appellant failed to present to the trial judge propositions of law and secure a ruling thereon it bars its right to have it considered on appeal. This is true where the right to a jury trial exists but not to a chancery case, where the parties have no such rights. *People ex rel. James v. Chicago, B. & Q. R. Co.*, 231 Ill. 112.

There being no right to a lien established by the evidence, the decree will be reversed and the cause remanded with directions that the order entering a decree be vacated and set aside, and a decree entered dismissing the bill for want of equity.

Reversed and remanded with directions.

**Nora Shinners, Administratrix, Plaintiff in Error, v.
Royal Coal and Mining Company, Defendant in Error.**

1. STATUTES, § 143*—*methods of repeal*. A prior statute may be repealed by express declaration of the Legislature, by amendment, by a general revision and by implication.

2. STATUTES, § 148*—*when provisions of former statute not repealed by revision*. Where the law on a particular subject is revised and rewritten, only the provisions of the old law that are omitted from the revised act are repealed, and all provisions of the old law retained in the new act are regarded as having been continuously in force.

3. MINES AND MINERALS, § 41*—*claims arising under Act of 1899 as affected by Act of 1911*. All undetermined claims arising under

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the old Miner's Act of 1899 before the Miner's Act of 1911, J. & A. ¶¶ 7475 *et seq.*, went into effect, *held* saved under the provisions of chapter 131, sec. 2, Hurd's R. S., J. & A. ¶ 11,103.

4. MINES AND MINERALS, § 41*—*effect of Act of 1911 as repealing former act.* The Miner's Act of 1911, J. & A. ¶¶ 7475 *et seq.*, was a revision of the former Act of 1899 and did not operate to repeal the provisions of section 18 of the old Act, since the provisions of such section are substantially repealed in section 21 of the new Act, J. & A. ¶ 7495.

5. MINES AND MINERALS, § 86*—*right to maintain action for violation of provisions of former statute.* Where a miner was injured in a mine while the Miner's Act of 1899 was in force and died after the Miner's Act of 1911 (J. & A. ¶ 7475) became effective, *held* his administrator could maintain an action for the benefit of the widow and children based on the wilful violations of the provisions of section 18 of the old Act.

Error to the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded with directions. Opinion filed July 28, 1914.

F. J. TECKLENBERG and D. J. SULLIVAN, for plaintiff in error.

M. U. HAYDEN and BARTHEL, FARMER & KLINGEL, for defendant in error.

MR. JUSTICE HARRIS delivered the opinion of the court.

This is a suit brought under the Miner's Act to recover damages resulting from the death of plaintiff in error's intestate, who was a miner, and was injured while at work in the mine of defendant in error on the twenty-seventh day of June, 1911. He died on the fourteenth day of November, 1911. The declaration filed consisted of four statutory counts. Each count of the declaration is predicated upon the provisions of the Miner's Act of 1899 and section 29 of the Miner's Act of 1911 (J. & A. ¶ 7503). The first count being

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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predicated upon section 18d of the Act of 1899, alleges a dangerous condition and that defendant's mine examiner willfully failed to make an examination and willfully failed to mark the dangerous place. The second is predicated upon section 18c, that the mine examiner willfully failed to make his daily record on the morning of the twenty-seventh day of June, 1911. The third is predicated on section 18b, that the mine manager willfully failed to prevent plaintiff in error's intestate from entering the mine and crosscut on the twenty-seventh day of June, 1911, before the dangerous conditions were made safe or removed, and that he was not there under direction of the mine manager for the purpose of making said dangerous conditions safe. The fourth count is predicated upon section 16d, and charges the willful failure of the mine manager to see that the dangerous place was properly marked or that a danger signal was properly displayed.

Each count of the declaration charged that a large piece of slate or other substance fell from the roof above the place, where plaintiff in error's intestate was working, upon him whereby his back was broken and he received other injuries from which he died November 14, 1911.

Each count of the declaration avers that plaintiff in error's intestate left surviving him as his next of kin and only heirs at law, his widow, Nora Shinners and Marcella Shinners and Florence Shinners, his only children, and that the next of kin have sustained loss and damage by reason of the death of Edward Shinners in the sum of ten thousand dollars, and therefore she brings suit.

To this declaration defendant in error files a general and special demurrer which was by the court sustained, and plaintiff in error electing to stand by the declaration judgment was entered accordingly against plaintiff in error for costs, exceptions taken, and orders entered for appeal. The argument by plaintiff in er-

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ror upon the presentation of the case in this court proceeds upon the theory that the declaration states a cause of action when challenged by general demurrer; and no reasons are assigned or argued for sustaining special demurrer by defendant in error.

The defendant in error says the judgment of the trial court should be sustained for the following reasons:

First. That the Miner's Act of 1899 was repealed on the first day of July, 1911, by the Miner's Act of 1911. (J. & A. ¶¶ 7475 *et seq.*)

Second. That the cause of action did not accrue in the plaintiff in error until the death of plaintiff in error's intestate November 14, 1911.

Third. That because of the happening of reasons 1 and 2 in this case and the wrongful act, neglect or default charged as occurring on the twenty-seventh day of June, 1911, and death following on November 14, 1911, leaves plaintiff in error without a good cause of action under either the Statute of 1899 or the Statute of 1911.

The first question to be answered is, was the Act of 1899 repealed by the Act of 1911, as the word repealed is commonly understood, that is, obliterated, done away with, without anything substituted for and in place of it, not literally or substantially like it. If upon investigation this be true, all causes of action that had not accrued to the party bringing suit and ripened into vested rights would abate, and the authorities cited by defendant in error upon this proposition should prevail. Therefore the question of repeal or revision as to the law applicable to this declaration is the all important question. There are different methods of repealing a prior statute:

By express declaration of Legislature and nothing substituted for the act repealed.

By amendment, if the Legislature enacts an amendatory statute providing that a certain act or a certain section of an act shall be amended so as to read as the

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same is repeated in the amendatory act, all such portions of the old act or section as are not repeated in the new act are repealed without express words for that purpose, but such portions of the old law as are retained, either literally or substantially, are regarded as a continuation of the old law and not as a new enactment. *Merlo v. Johnston City & B. M. Coal & Mining Co.*, 258 Ill. 328; *Moore v. Mausert*, 49 N. Y. 332; Hurd's St. 1911, ch. 131, sec. 2, (J. & A. ¶ 11,103.)

Statutes may be repealed by a general revision. Where the law on a particular subject is revised and rewritten, only the provisions of the old law that are omitted from the revised act are repealed, and all provisions of the old law retained in the new act are regarded as having been continuously in force. *Merlo v. Johnston City & B. M. Coal & Mining Co.*, 258 Ill. 328; *Mette v. Feltgen*, 148 Ill. 357.

The rule in respect to repeals by revision is the same as repeals by amendment. There is nothing startling nor is there chaos between the death of the old and the coming of the new law. Both events take place at one and the same time, the power that destroys the old gives life and vitality to the new.

Repeals by implication take place when a later act is so repugnant to a former one that both cannot stand together. The inconsistency established, the latter act in date or position has full force and displaces whatever in the precedent law is repugnant to it. *Merlo v. Johnston City & B. M. Coal & Mining Co.*, 258 Ill. 328; *Pavey v. Utter*, 132 Ill. 489. A legislative declaration that an act is or is not repealed is only a declaration of the Legislature upon a judicial question, which is not binding on the courts. *United States v. Claflin*, 97 U. S. 546.

Under the above rule of construction as laid down by our Supreme Court, a number of times the Miner's Act of 1911, consisting of thirty-one sections, was a revision of the law applicable to coal mines and de-

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signed as a substitute for the Act of 1899. Substantially all the subjects found in the old act appear in the new, recast and rewritten. While differing in detail, both acts relate to the same general subject and are intended to accomplish the same general purpose.

It is not necessary to a decision of the question before us to point out all the differences between the old and the new acts. The legal question to be determined upon this record is whether the Act of 1911 so far repealed the former statute as to deprive plaintiff in error of all rights under a prior law. The first, second and third counts of the declaration predicated upon section 18 of the old law are substantially repeated in section 21 of the Revisionary Act (J. & A., ¶ 7495); whatever conclusion might be reached in regard to other provisions of the old law, so far as the case at bar is concerned, the new act does not affect its legal status.

Under the second and third reasons assigned by defendant in error, an injury resulting from the wrongful act, neglect or default of another gives the injured party, if he survives, a right of action, and if he dies this right of action survives to his personal representative under the statute. *Crane v. Chicago & W. I. R. Co.*, 233 Ill. 259.

Our attention is called to the difference between the Laws of 1899 and 1911 as to who may recover in case of death. This appears under section 33 of the Act of 1899 and section 29 of the Act of 1911. (J. & A. ¶ 7503.) These two sections relate to the subject of penalties for the violation of the respective acts. Under section 33 it was provided that in case of loss of life by reason of a wilful violation of the statute a right of action should accrue to the widow of the person so killed, his lineal heirs or adopted children, or any other person or persons who before such loss of life were dependent for support on the person so killed, for recovery of damages for injury sustained not to exceed ten thousand dollars. The corresponding provision of

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section 29 of the new act gives a right of action, to the personal representative of the person killed, for the exclusive benefit of the widow and next of kin of such person, and to any other person or persons who before such loss of life were dependent for support on the person or persons so killed, for a like recovery for the injuries sustained not exceeding ten thousand dollars, to which is added a provision for distribution, the same as the law distributes personal property left by persons dying intestate.

It will be noted there are two differences in these two sections: First, as to the name of party in whose name suit is to be brought, a mere matter of procedure, and does not affect the substantial rights of the parties. *Encyc. of Pl. & Pr.* Sec. 15, p. 483.

Second, a recovery under the old law was for the exclusive benefit of widow, lineal heirs, adopted children and dependents, while under the new law it is for the benefit of widow, next of kin and dependent persons. In the case at bar deceased left a widow and two children who, under the law of distribution of personal property, would take it all as his widow and heirs at law, being the same under either statute to the entire amount of recovery.

It would hardly be necessary to add that we express no opinion in regard to the rights of beneficiaries under the new statute where they are not the same under the old law. We have no doubt under our saving statute (chapter 131, sec. 2, *Hurd's R. S., J. & A.* ¶ 11,103) all undetermined claims arising under the old mining law whether suit had been commenced or not prior to July 1, 1911, are saved, and that the provisions of the old statutes, so far as they concern the cause of action, are to be regarded as continuing until such cause is disposed of. Therefore the demurrer in this case should have been overruled, and the judgment will be reversed and cause remanded with directions to set

Emery v. Hersh, 188 Ill. App. 342.

aside judgment and order sustaining demurrer and an order entered overruling demurrer.

Reversed and remanded with directions.

George D. Emery, Appellant, v. E. W. Hersh, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Jasper county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

Statement of the Case.

Action by George D. Emery against E. W. Hersh in assumpsit to recover for services rendered by plaintiff for defendant in examining titles to certain real estate, advising as to said titles and in preparing forms for the issue of bonds and representing defendant in a transaction then pending for the issue and sale of bonds as his attorney. From a judgment entered on a finding by the trial court in favor of defendant, plaintiff appeals.

H. M. KASSERMAN and DUANE GAINES, for appellant.

FITHIAN & KASSERMAN, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

ATTORNEY AND CLIENT, § 135*—*when finding as to terms of contract of employment against weight of the evidence.* In an action by an attorney for services rendered defendant in examining titles

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Salerno v. Missouri and Illinois Coal Co., 188 Ill. App. 343.

to land, giving advice regarding the titles and preparing forms for an issue of bonds, etc., where defendant claimed that he employed plaintiff after the bonds were issued to furnish a written opinion and that the agreement was that plaintiff should be paid out of a fund allowed by the owners of the land in case of a sale of the bonds, *held* that a finding of the trial court in favor of defendant was against the manifest weight of the evidence, there being no evidence that plaintiff had agreed to accept employment in the way claimed by defendant or any evidence to show that plaintiff knew of the arrangement or acquiesced in it.

Joseph Salerno, Appellee, v. Missouri and Illinois Coal Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of St. Clair county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by Joseph Salerno against Missouri and Illinois Coal Company to recover for personal injuries sustained by plaintiff while working in defendant's mine. The declaration consisted of four counts, three statutory counts and one common-law count. The three statutory counts alleged that the mine examiner failed to furnish props when demanded, failed to inspect the roof of the mine and to make a record of the dangerous condition of the roof of the mine, and that he failed to mark the roof as dangerous. The common-law count alleged the same condition of the roof of the mine and that the mine manager after a demand for props inspected the roof, informed plaintiff that the roof was safe and directed plaintiff to proceed with his work. A plea of the general issue was filed. From a judgment entered on a verdict in favor of

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plaintiff for one thousand two hundred and fifty dollars, defendant appeals.

BARTHEL, FARMER & KLINGEL, for appellant.

WEBB & WEBB, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. MINES AND MINERALS, § 173*—*when evidence sufficient to warrant recovery under declaration.* In an action by a miner for personal injuries sustained by the fall of the roof of a mine, evidence held sufficient to sustain a recovery under the statutory counts in the declaration charging the mine examiner with failure to furnish props and to inspect and mark the dangerous condition of the roof.

2. NEGLIGENCE, § 48*—*proximate cause.* The proximate cause is not necessarily the beginning cause but the efficient cause, such a cause in the absence of proof which the court would say as a matter of law the injury would not have occurred.

3. MINES AND MINERALS, § 84*—*what constitutes a wilful violation of the statute.* A wilful violation of the Miner's Act is nothing more than a conscious violation thereof, and such is to be determined from all the facts and circumstances in evidence.

4. MINES AND MINERALS, § 194*—*when requested instruction properly refused.* An instruction telling the jury "that if you believe from the evidence that the plaintiff knew the roof in his working place was loose and liable to fall and injure him, and that knowing this continued to work under such dangerous roof and was injured in consequence thereof, then you should find defendant not guilty as to the fourth count," held properly refused as ignoring the alleged examination of the mine manager and his assurances of safety, and also as ignoring the principal of law that although plaintiff may have known there was some danger, yet if the danger was not such that an ordinary prudent person would refuse to work, then he might continue.

5. APPEAL AND ERROR, § 1560*—*when refusal of requested instruction not error.* The refusal of a requested instruction applicable to only one count in the declaration is immaterial where the evidence is sufficient to support the verdict and judgment under other counts.

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

Huback v. Wabash Railroad Co. et al., 188 Ill. App. 345.

6. APPEAL AND ERROR, § 1561*—*when refusal of requested instruction harmless.* The refusal of a requested instruction is not reversible error where it was practically covered by other instructions given.

**John Huback, Appellee, v. Wabash Railroad Company
and Illinois Terminal Railroad Company, Appel-
lants.**

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by John Huback against the Wabash Railroad Company and Illinois Terminal Railroad Company, to recover for personal injuries received by plaintiff while in the employ of defendants as a brakeman. The facts showed that plaintiff was a brakeman on a train operated jointly by the defendants; that on a certain trip on the road defendants required the train to run backward with the coaches in front of the engine and that at such times it was the duty of plaintiff to ride on the foremost platform of the first coach and to sound an air whistle as a warning when the train approached a street crossing and to apply the air brakes when required; that on the occasion of the injury in question plaintiff was thus on the platform of the first coach of the train and when the train approached a street crossing plaintiff noticed a team and wagon being driven upon said crossing and attempted to stop the train by applying the air brake, but the brake failed to work properly and the train struck the team and wagon with

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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great force causing plaintiff to be thrown to the ground and injured.

The negligence averred is that defendant failed to provide a sufficient air brake and in allowing it to remain in defective condition, in that the piston in each of the brakes upon the coaches had too much travel, namely, ten inches of travel, when the piston should have not to exceed six inches of travel in order that the brakes could be set by means of a lever with sufficient quickness to stop the train in such emergencies.

A plea of the general issue was filed. The jury returned a verdict in favor of plaintiff for seventy-five hundred dollars. To reverse a judgment entered on the verdict, defendants appeal.

WARNOCK, WILLIAMSON & BURROUGHS, for appellants.

GEERS & GEERS, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 687*—*when recovery by brakeman for injuries resulting from defective air brake sustained by the evidence.* In an action by a brakeman to recover for personal injuries received by him in a collision between defendants' train and a team and wagon at a street crossing alleged to have been caused by defendants' negligence in permitting the air brake to remain out of repair so that plaintiff could not operate it to avert the collision, *held* under the evidence whether or not the brakes were defective and whether such defect was the cause of the injury were questions for the jury and that verdict for plaintiff was sustained by the evidence.

2. MASTER AND SERVANT, § 572*—*burden of proof.* In an action by a brakeman to recover for injuries resulting from a defective air brake, the burden is on the plaintiff to prove by a preponderance of the evidence the existence of some defect in the construction or operation of the air brake, and that the plaintiff did not know of

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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such defect and did not have equal opportunities with defendants of knowing of it.

3. **NEGLIGENCE, § 125***—*necessity of alleging and proving due care of plaintiff.* In an action for personal injuries the plaintiff must allege and prove that he was free from contributory negligence.

4. **MASTER AND SERVANT, § 452***—*when servant chargeable with knowledge of defective appliance.* To charge a servant with negligence he must not only know or have the means of knowing by the exercise of ordinary care of the defect, but must also know that the defect renders the appliance unsafe to use, and he is not bound to make an inspection for latent defects.

5. **MASTER AND SERVANT, § 685***—*proof of servant's want of knowledge of defects in appliances.* Where a servant's want of knowledge of defects in appliances is not susceptible of direct proof it may be inferred from circumstances and the servant may be aided by the presumption that a person does not voluntarily incur danger or the risk of death.

6. **MASTER AND SERVANT, § 457***—*duty of servant to discover defects.* A servant is under no primary liability to investigate for latent defects to test the fitness and safety of the place, fixtures or appliances provided him by the master; he may assume that they are fit and safe, though the circumstances may be such that a servant is chargeable with knowledge of such defects as are patent and obvious and of such defects as in the exercise of ordinary care he ought to have knowledge of, and he is not deemed to have notice or knowledge of such defects and insufficiencies as can be ascertained only by investigation and inspection for the purpose of ascertaining that there is no danger.

7. **MASTER AND SERVANT, § 120***—*duty of master to keep appliances in safe condition.* While there is no absolute duty upon the master to keep appliances in safe condition there is a duty to use reasonable care to keep them fit, and this duty may require inspection at reasonable intervals and the employment of such tests as will reveal the condition of the machinery or appliances.

8. **MASTER AND SERVANT, § 161***—*duty to inspect appliances.* The master's duty of inspection rests upon the employer and not upon the employee and depends upon the character of the machinery or appliances, since ordinary care may require an inspection oftener in one case than in another.

9. **MASTER AND SERVANT, § 302***—*risks assumed by servant.* While an employee assumes such risk of his employment as is usually incident thereto and of the extraordinary hazards of which he has notice, or which in the usual exercise of his faculties he ought to have notice, he does not take the risk or dangers known to the

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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master which can be avoided by him in the exercise of reasonable care; he assumes the risk more or less hazardous of the service of which he is engaged, but he has a right to presume that all proper attention shall be given to his safety and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and preventable by ordinary care and precaution on the part of his employer.

10. MASTER AND SERVANT, § 685*—*proof of notice to master of defective condition of appliances.* Notice to the employer of a defective condition of appliances may not be capable of direct proof and is not required; such notice may be proven by facts and circumstances which the master has notice of or an opportunity to have knowledge of which is not open to the servant.

11. NEW TRIAL, § 125*—*when denial of motion for not an abuse of discretion.* Overruling of a motion for new trial on the ground of newly-discovered evidence, *held* not an abuse of discretion where there was no showing of proper diligence and the evidence would have been cumulative.

Samuel R. Montgomery et al., Appellees, v. O. Hickok et al., Appellants.

(Not to be reported in full.)

Appeal from the Circuit Court of Crawford county; the Hon. ENOCH E. NEWLIN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by Samuel R. Montgomery, Alice Montgomery and Herman Montgomery against O. Hickok, W. C. Turner, Fred Zeigler, D. E. Jones, J. W. White and W. E. Stathers to recover from the defendants the sum of one thousand dollars alleged to be due from defendants to plaintiffs upon an oil and gas lease executed by plaintiffs to Fred Zeigler on a forty acre tract of land.

The declaration alleged that defendants by various assignments and conveyances became the owners of

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

said lease as a copartnership under the name of the Bess Oil Company and that said company pursuant to the terms of the lease drilled a well on said lands which said well when completed was a paying oil well within the meaning of the terms of the lease, which provided that the lessee should pay to the lessor the sum of two thousand dollars in case the first should be a paying well. The declaration further alleged that by reason thereof defendants became indebted to plaintiffs in the sum two thousand dollars and that they had paid the sum of one thousand dollars on the debt.

The defendants J. W. White, W. C. Turner and W. E. Stathers each for himself filed a plea of the general issue, a verified plea denying joint liability, and a plea of the statute of frauds. By agreement a jury was waived and the cause tried by the court. The suit at the conclusion of the evidence was dismissed as to Fred Zeigler. The court found the issues in favor of plaintiffs against O. Hickok, W. C. Turner, D. E. Jones, J. W. White and W. E. Stathers for one thousand dollars, and upon the finding entered judgment against W. C. Turner, J. W. White and W. E. Stathers, the defendants of whom the court had jurisdiction, and on plaintiff's motion ordered *scire facias* to issue against the defendants O. Hickok and D. E. Jones to show cause why they should not be made parties to the judgment. To reverse the judgment Turner, White and Stathers appeal.

By the terms of the lease all covenants and agreements between the parties were extended to their heirs, executors, administrators, successors and assigns.

McCARTY & ARNOLD, for appellants.

PARKER & EAGLETON, for appellees.

MR. JUSTICE HARRIS delivered the opinion of the court.

Bell v. East St. Louis and Suburban Ry. Co., 188 Ill. App. 350.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 415*—*when covenant in lease binding on assignees.* Where a covenant between lessor and lessee relates to a thing not *in esse* but which is yet to be done upon the land tending to enhance its value or to render its enjoyment more beneficial to the owner or occupant, the assignees if named are also bound.

2. COVENANTS, § 19*—*when covenant in oil and gas lease runs with the land.* A covenant in an oil and gas lease providing for the payment of a certain sum to the lessor in case the first oil well is a paying well, *held* to be a covenant running with the land and binding upon the assignees of the lessee where they proceeded under the lease, drilled the well and made a part payment to the lessor according to the terms of the lease.

3. LANDLORD AND TENANT, § 67*—*what constitutes "paying well" within meaning of oil and gas lease.* Under a covenant in an oil and gas lease to pay a certain sum in case a well drilled by the lessee is a paying well, *held* that the cost of equipment and drilling of the well was not to be taken into consideration in determining whether it was a paying well.

4. PARTNERSHIP, § 30*—*when persons liable as partners.* Assignees taking an assignment of an oil and gas lease from the lessee and drilling an oil well pursuant to the terms of the lease under the name of an oil company, *held*, liable to the lessor on the covenants in the lease as partners regardless of any arrangement between them as a partnership.

Mary E. Bell, Administratrix, Appellee, v. East St. Louis & Suburban Railway Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. THOMAS M. JERR, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bell v. East St. Louis and Suburban Ry. Co., 188 Ill. App. 350.

Statement of the Case.

Action by Mary E. Bell, administratrix of the estate of John Bell, deceased, against East St. Louis & Suburban Railway Company to recover damages for the death of plaintiff's intestate resulting from one of defendant's cars colliding with a team and wagon which the deceased was driving on a street occupied by defendant's tracks in Collinsville, Illinois.

From a judgment entered on a verdict in favor of plaintiff for fifty-two hundred and fifty dollars defendant appeals.

WILLIAMSON, BURROUGHS & RYDER, for appellant.

CHARLES H. BURTON and TRAUTMANN, FLANNIGEN, BAXTER & HAMLIN, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

STREET RAILROADS, § 131*—*when recovery for death of driver of wagon in collision with car not sustained by the evidence.* In an action against a suburban railway company to recover for the death of plaintiff's intestate caused by one of defendant's cars colliding with a team and wagon which the deceased was driving in a street occupied by the tracks of the defendant, *held* that a verdict for plaintiff could not be sustained, there being uncontradicted evidence showing that deceased was driving in the same direction the car was going and that he attempted to cross the track within one hundred feet of the approaching car, and it also appearing that the team and front wheel of the wagon was struck instead of the rear of the wagon, and that the car was stopped within eight to fifteen feet after the accident.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Heller & Livingston v. American C. & F. Co., 188 Ill. App. 352.

Heller & Livingston, Appellant, v. American Car & Foundry Company, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by Heller & Livingston against the American Car & Foundry Company to recover on an assignment of wages executed to the plaintiff by one Floyd Aiken of his wages earned while in the employ of defendant. The suit was originally commenced before a justice of the peace and an appeal was taken to the Circuit Court, where upon a trial by a jury the court at close of the evidence offered by plaintiff directed a verdict for defendant and rendered judgment on the verdict. To reverse the judgment, plaintiff appeals.

The only ground relied on by appellant for a reversal is that the judgment was based on a finding that no sufficient notice of the assignment had been lawfully served on the defendant.

TRAUTMAN, FLANNIGEN, BAXTER & HAMLIN, for appellant; H. B. EATON, of counsel.

WILLIAM E. WHEELER, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. ASSIGNMENTS, § 19*—*necessity of proof of notice of assignment of wages.* In an action on an assignment of wages, where the defense was that defendant had not received notice of the assign-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Weinstein v. Garcinski, 188 Ill. App. 353.

ment and that the wages had been paid to the employee, *held* that a direction of a verdict for defendant was proper where there was no competent evidence to show notice to the defendant of the assignment.

2. NOTICE, § 51*—*when foundation for reception in evidence of copy of mailed notice insufficient.* In an action to recover on an assignment of wages, a copy of a notice of the assignment claimed to have been served on the defendant by mail *held* properly excluded, for the reason there was no proper foundation laid for its introduction, where there was no evidence offered to show that the copy of the notice was inclosed in an envelope directed to defendant with a proper amount of postage thereon and deposited in a place for the receiving of United States mail.

3. NOTICE, § 51*—*when registry receipt for letter insufficient to prove mailed notice.* A post office registry receipt for a letter in which it is claimed a notice to the sendee was inclosed, does not of itself prove what was received.

M. Weinstein, Appellant, v. Pete Garcinski, Appellee.

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Action by M. Weinstein against Pete Garcinski, to recover the sum of \$100 claimed to be due from defendant to plaintiff. The claim arose out of a transaction regarding checks received by plaintiff from defendant. It appeared that defendant brought a number of checks which he had cashed for other parties to plaintiff's place of business and told the plaintiff that he needed more funds to cash checks and that the plaintiff took the checks, which he claims amounted to \$452.45, and defendant claims amounted to \$552.37; that plaintiff gave to defendant at that time \$300 in cash; that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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later the wife of defendant called for the balance and plaintiff informed her that he had not obtained the cash on the checks and at her request gave her \$245.12 in checks and \$7.33 in cash. Plaintiff claims the understanding was that she was to return and pay him in cash the sum of \$100, but this is denied by defendant.

The suit was originally commenced before a justice of the peace and plaintiff had judgment. An appeal was taken to the City Court of East St. Louis where upon a trial before a jury a verdict was returned in favor of defendant and judgment was entered on the verdict and against the plaintiff for costs. To reverse the judgment, plaintiff appeals.

ALEXANDER FLANNIGEN and JESSE M. FREELS, for appellant.

J. E. GRACE, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 390*—*when question asked of party not objectionable as calling for conclusion.* In an action to recover a certain sum claimed to be due to plaintiff from defendant, where the defendant was permitted to be asked the question, "Do you owe plaintiff anything now?" and defendant answered, "I don't owe one penny," *held* that the question was not objectionable as calling for a conclusion of the witness on the issue, since it is proper for defendant as a party to the suit to deny the claim of plaintiff in as broad terms as the plaintiff made his claim.

2. APPEAL AND ERROR, § 1523*—*when error in instruction will not reverse.* The giving of an instruction which is improper for the reason it calls upon the jury to determine what are the material issues in the case, *held* not reversible error where the issues were simple and it appeared that substantial justice had been done.

3. APPEAL AND ERROR, § 1401*—*when verdict will not be disturbed.* The Appellate Court will not set aside a verdict on the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ground that the jury have reached a wrong conclusion as to the facts or a different conclusion than that entertained by the court, unless the record shows that the verdict is against the clear preponderance of the evidence.

**James C. Kennedy, Administrator, Appellee, v. Chicago
and Carterville Coal Company, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Williamson county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the March term, 1914. Reversed with finding of fact. Opinion filed July 28, 1914.

Statement of the Case.

Action by James C. Kennedy, administrator of the estate of John S. Kennedy, deceased, against the Chicago and Carterville Coal Company to recover damages for the death of plaintiff's intestate alleged to have resulted from the fall of slate and rock from the roof of the defendant's mine while deceased was assisting other servants in taking down a certain low portion of the roof. The jury returned a verdict in favor of plaintiff for three thousand dollars. To reverse the judgment entered on the verdict, defendant appeals.

This case has been tried twice and submitted to two juries upon the same declaration, the jury on each trial returning a verdict in favor of plaintiff for three thousand dollars.

This is the second appeal to the Appellate Court by the appellant. The opinion on the former appeal appears in 180 Ill. App. 42, and the statement of facts as appears in that opinion, and also the opinion is adopted by the Appellate Court on this appeal, the evidence

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contained in the record of both appeals being the same so far as the issues are concerned. As to the points decided in the opinion rendered on the former appeal, see that opinion.

DENISON & SPILLER, for appellant; MASTIN & SHERLOCK, of counsel.

NEELY, GALLIMORE, COOK & POTTER, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. MINES AND MINERS, § 122*—*when miner assumes risk of dangerous condition of roof of mine.* In an action against a mining company to recover for the death of plaintiff's intestate alleged to have been caused by the fall of slate and rock from defendant's mine while he was obeying a negligent order of defendant's foreman to assist in taking down a portion of the roof, *held* that a verdict for plaintiff was not sustained by the evidence, it appearing that the deceased was an experienced miner competent to perform any kind of dangerous work, that the condition of the roof was as well known to him as the defendant and that the order given was a general order and not a specific order to do the work in any particular manner.

2. APPEAL AND ERROR, § 1810*—*when judgment may be reversed.* The Appellate Court will reverse a judgment based on a verdict of a jury, where it appears that the judgment is clearly against the manifest weight of the evidence, that the facts in the case will never appear different and that another trial would serve no good purpose.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bateman v. Carterville & Big Muddy Coal Co., 188 Ill. App. 357.

Lucy Bateman, Administratrix, Appellee, v. Carterville & Big Muddy Coal Company, Appellant.

1. **WORKMEN'S COMPENSATION ACT, § 2***—*evidence competent to prove employer's rejection of act.* A certified copy of the notice filed by the employer of his election not to come under the provisions of the Workmen's Compensation Act of 1911, J. & A. ¶¶ 5449 *et seq.*, is admissible as the best evidence to prove that the employer had rejected the provisions of the act. The original notice without proof of its being filed in accordance with the provisions of the act would be insufficient.

2. **WORKMEN'S COMPENSATION ACT, § 2***—*time election remains in force.* Where an employer exercises his election not to come under the provisions of the Workmen's Compensation Act of 1911, J. & A. ¶¶ 5449 *et seq.*, by filing notice as provided by the act, his election remains in force until the notice is withdrawn.

3. **DEATH, § 80***—*when giving of erroneous instruction on measure of damages reversible error.* In an action for wrongful death, the giving of an instruction directing the jury to allow plaintiff such damages as they may find from the greater weight of all the evidence that the widow and next of kin have suffered, not exceeding the sum claimed in the declaration, *held* reversible error, for the reason that the instruction did not limit the recovery to the pecuniary loss sustained and also because it directed attention to the amount claimed in the declaration.

4. **MINES AND MINERALS, § 148***—*when admission of evidence relating to negligence not charged in declaration reversible error.* In an action to recover for the death of an employee in a mine alleged to have resulted from a willful violation of section 16 of the Mining Act, J. & A. ¶ 7490, in allowing mine cars to be provided with swinging hook couplings, permitting a witness to testify as to whether there were any lights on the motor, and whether there was anything between the cars to prevent them from getting loose if they became disconnected or uncoupled, *held* reversible error where there were no averments in the declaration charging negligence with reference to the lights or connections other than the coupling.

5. **INSTRUCTIONS, § 110***—*when erroneous as inapplicable to the pleadings.* An instruction referring to "plaintiff's case" rather than to the averments of the declaration is erroneous as inapplicable to the pleadings.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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6. MASTER AND SERVANT, § 800*—*when instruction erroneous.* In an action for the death of an employee, an instruction given for plaintiff *held* erroneous as allowing the jury to speculate what was a safe and an unsafe place to work.

Appeal from the Circuit Court of Williamson county; the Hon. A. E. SOMERS, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

DENISON & SPILLER, for appellant; MASTIN & SHERLOCK, of counsel.

NEELY, GALLIMORE, COOK & POTTER, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

This action in case was brought by appellee against appellant to recover damages for the death of appellee's intestate, which occurred March 3, 1913. There was filed in the case a declaration consisting of thirteen counts. However, at the close of appellee's evidence, appellee withdrew the fourth count and the court instructed the jury to find the appellant not guilty under the second, third, sixth, seventh, ninth, tenth and eleventh counts. Therefore we will consider only the first, fifth, eighth, twelfth and thirteenth counts as amended. The first count charges common-law negligence; that the deceased was employed in the main north entry as a trackman; that appellant furnished him an unsafe place to work, in this, it required him to work at a certain point in the entry while its agents were driving loaded cars of coal up a steep incline, while the cars were insufficiently attached to each other and to the motor by open and defective links and hooks of iron, so that they were reasonably certain when slackened to become detached from each other and from said motor and run back down said incline; that appellant knew, or by the exercise of reasonable care could have known, of the open and defective

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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links and couplings of the cars; that deceased did not know of the open and defective couplings nor have equal means with appellant of knowing thereof; that while deceased was in the exercise of due care for his own safety, the cars became detached by reason of the open and defective links and couplings of the cars; that deceased did not know of the open and defective couplings nor have equal means with appellant of knowing thereof; that while deceased was in the exercise of due care for his own safety, the cars became detached by reason of the open and defective links, hooks and couplings and ran back down the incline; that appellant had made an election and filed the same with the Secretary of the State Bureau of Labor Statistics not to provide and pay compensation to its employees arising out of and in the course of employment, and had not withdrawn said election on the date deceased was killed.

The fifth count as amended is practically the same as the first amended count, except that it does not aver due care on the part of deceased and does not negative knowledge on the part of deceased of defective couplings. The eighth count is practically the same as the first amended count. The twelfth amended count is practically the same as the first amended count. The thirteenth or statutory count as amended averred, in addition to the formal averment, that appellant wilfully violated the provisions of section 16 of the Mining Act (J. & A. ¶ 7490) in that it wilfully allowed the mine cars to be provided with swinging open hook couplings while the same were then and there provided with more than one link on the end thereof for coupling purposes; that while deceased was at work in said entry a number of cars became detached because of there being more than one link on the end of said cars and the cars being provided with swinging open hook couplings, and ran to and against deceased, killing him; that appellant made an election in

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writing and filed the same with Secretary of the State Bureau of Labor Statistics not to provide and pay compensation to its employees arising out of and in the course of their employment and had not withdrawn said election on the date deceased was killed.

All of said counts averred that Thomas L. Bateman was killed on the third day of March, 1913, and left surviving appellee and three children as his heirs at law and averred damages in the sum of \$10,000. Letters of administration were issued to appellee.

To the declaration as amended appellants filed a plea of not guilty, and upon trial of the issues so joined by a jury a verdict was returned finding appellant guilty and assessing damages at the sum of \$5,000. Motion for new trial was overruled, judgment rendered on the verdict and this appeal taken.

The undisputed facts in this case are: That appellant on the third day of March, 1913, was operating a coal mine in Williamson county and that Thomas L. Bateman, a man thirty-five years of age, was employed by appellant as trackman, earning in that capacity the sum of \$2.80 per day, and on that day was working on the track in the main north entry at a point about half a mile from the bottom of the shaft. The track in this entry was on a grade averaging about one per cent. but in some places the grade was steeper and in other places it was less than that. If cars were turned loose at a point some two or three hundred feet from the bottom where the incline began, they would run north and gain in speed until they reached the parting where the coal cars loaded with coal were assembled by the drivers from the various workings. The plan of operation was this: The pit cars were loaded in the various rooms by the miners, gathered up by drivers with mules and pulled out to the partings, where they were assembled and coupled together by a person employed for that purpose and known as the coupler. There they were taken by the motor and hauled in long trains

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to the bottom of the shaft where they were loaded on cages and hoisted to the surface. The motor was passing up and down the main north entry continuously during working hours, hauling train loads of cars to the bottom from the parting and trains of empties from the bottom to the parting. Mr. Bateman had been regularly employed as trackman on the track where the motor ran. It was his duty to keep the track in proper repair and condition. When a trip of cars would start from the parting it was under the control of two employees, the motorman, who handled the motor, and the trip rider, who rode on the motor and put sand on the track when needed and attended to the switching. In returning to the parting from the bottom with a load of empties, the trip rider would ride on the back end of the cars.

At the time of the accident the motor and a trip of twelve or thirteen loaded pit cars were going from the parting to the bottom; the motorman noticed Mr. Bateman standing beside the track as he passed him, and the trip went on until it reached the top of the incline; the motor and four cars had gotten to the top and was on level ground when the fifth car from the front end became uncoupled from the the fourth car, and the rear eight cars stopped and started to run back down the incline. The motorman discovered that the cars had become uncoupled by his engine speeding up and he at once stopped, jumped off the motor and ran back to the cars and tried to hold them with his hands, but they already had some momentum and he could not hold them and had to let them go; he returned to the motor and went on to the bottom about two or three hundred feet with the four cars, and informed the bottom man that the trip had come in two; the bottom man went to the telephone and telephoned back down to the parting that the trip of cars was coming back down the track. The boss driver was on the parting and received the telephone message; he

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at once informed the assistant manager, who was there, and he gave the warning to the other men at the parting and all got in the clear. Soon afterwards seven of the runaway cars reached the parting where they ran into other cars standing on the track and stopped. The motorman coupled onto another load of empties at the bottom and started to the parting at once; on reaching a certain part of the entry he found that the fifth car from the motor had become detached from the other seven that ran away and had jumped the track and stopped. From all the circumstances it appears that Mr. Bateman saw or heard the runaway trip coming down the entry and he got out of the way and allowed the first seven cars to pass, and they went on to the parting. As soon as they passed him, he evidently stepped on to the track behind them thinking they had all passed, and was struck by the other car that had become loose from the seven and was run over and killed; his body was found lying across the track within about eight feet of the car; he had been run over by the car causing it to leave the rails and run into the rib of the entry and stop; his head was crushed and his limbs were broken and he was dead when found.

The disputed facts, in so far as material to a proper consideration of this case, will be taken up and discussed in their proper order.

A reversal of this case being necessary under the law, the questions of law and facts will be divided into three parts or branches:

- (1) Those questions that should be passed upon to assist in another trial of the case.
- (2) Those questions which in the opinion of the court constitute reversible error.
- (3) Those questions while error would not, standing alone, be held to be reversible error and upon another hearing would not be likely to appear in the record.

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The first and second of these divisions or branches will be discussed and disposed of accordingly. We regard it unnecessary to extend this opinion by either passing upon or referring to the errors coming under the third branch or division.

Appellant says that it was error for the court to deny its motion for peremptory instruction. This alleged error is predicated upon the assumption by appellant that it was operating its mine at the time of the accident under the Act approved June 10, 1911, in force May 1, 1912, known as the "Workmen's Compensation Act." (J. & A. ¶¶ 5449 *et seq.*)

If this assumption, from an examination of the law and facts, proves to be true, the peremptory instruction should have been given, as the facts so far as material are not in dispute.

The only notice that is claimed by appellee to have been given by appellant that it would not provide compensation and come under said Act is of date March 29, 1912, and filed with the Secretary of the Bureau of Labor Statistics of the State of Illinois, April 4, 1912.

It is argued by appellant that this notice of rejecting the provisions of this Act was for the remainder of the year 1912 only, and unless a further notice was given sixty days previous to the first day of January, 1913, appellant automatically on January 1, 1913, went under its provisions by operation of law.

It is further argued that the copy of the notice introduced in evidence was incompetent. If appellant went under provisions of the act automatically or if there was no competent evidence showing appellant had rejected the act, peremptory instruction should have been given and would bring to an end further discussion of the errors assigned.

The question whether or not appellant was after January 1, 1913, and on the day of the accident under

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the provisions of the Compensation Act of 1911, is a matter of construction to be put upon the act.

The Statute reads as follows:

“Section 1. Any employer covered by the provisions of this act may elect to provide and pay compensation for injuries, * * * and thereby relieve himself from any liability for the recovery of damages except as herein provided. If, however, any such employer shall elect not to provide and pay compensation * * * he shall not escape liability because. * * *

(A) Every such employer is presumed to have elected to provide and pay compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with the State Bureau of Labor Statistics.

(B) Every employer within the provisions of this act failing to file such notice shall be bound hereby as to all his employees who shall elect to come within the provisions of this Act until January 1st of the next succeeding year and for terms of each year thereafter.” (J. & A. ¶ 5449.)

It has become a part of this law, by decision of the Supreme Court, that at the outset and until notice was filed to the contrary, employer and employees within the act, by silence, accept it and automatically, by operation of law, come under its provisions and are bound by it until such times and in such manner as the law provides they could give notice to the contrary. This does not mean that it is necessary to accept it at the beginning of each year, but, once accepted, that acceptance is good until the proper notice is given not to be bound by it.

Having elected to come under its provisions as long as such election remains in force, the act is effective as to parties making election, and in case both employer and employee elect to come under its provisions the act itself becomes a part of the contract of employment. *Deibeikis v. Link-Belt Co.*, 261 Ill. 454. The

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statute does not provide how or when by an election made by employer rejecting the act he may again come under it. To hold that the notice he gives is good as a rejection for only a limited time is not authorized by the statute, and to so hold would be by reading into the statute something that does not appear, viz., this notice of rejection is to be binding until another or further notice is given January 1st, following.

This construction, unless made necessary by the statute, would not be in accord with the acts that bind a party making a statement or giving a notice. Where a notice or statement affects the contractual relations of parties made by one of the parties, he is held by such statement until it is withdrawn or otherwise disposed of. In this case the notice given stood as a negative election to be acted upon by all interested parties until withdrawn. The fact that the same Statute of 1913 makes this provision does not give to the Statute of 1911, a different meaning, but it would appear that the Legislature was intending to give it a construction that could not be misunderstood.

There is no provision in the act which confers upon the employee the right to elect to be governed by the act in his relations to an employer who had rejected it.

The notice that the employer had rejected the provisions, on file at the place provided by law, good until withdrawn, as fixing the status of the parties, is the most reasonable and logical construction, and the court did not commit error in holding that appellant was not operating its coal mine in question at the time of the accident under the provisions of the Compensation Act of 1911, it being the intention of the Legislature that there could be but two elections, one to come under the act, and the other to reject it, the first exercised by silence and the other by a negative elec-

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tion. The second or negative election can only be made in the manner and at the time provided by the act for the protection of the rights of those under the act, but when such negative election is exercised it is for such a period of time as the parties so electing may desire; and until such an election is withdrawn, as an inducement to employers to operate under the act, those within its provisions who rejected it forfeited the right to the defenses enumerated therein, and these defenses are lost without regard to the status of the employee. *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419.

The provisions of the act with reference to the sixty days' notice is for the benefit of those having rights which have accrued to them under the act, or which might accrue before, under the law, they could change their status under the act. The rights of all interested parties, where the employer is operating under a notice rejecting the act, are at all times fixed by the act and under the law, and it is immaterial in point of time when it withdraws its negative election.

Upon the question of directing a verdict as well as admitting improper evidence, the admissibility of the certified copy, filed with the Bureau of Labor Statistics April 4, 1912, offered in evidence by appellee and admitted by the court is to be disposed of. Under section 1 of the act, (A) "Every such employer is presumed to have elected to provide and pay compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with State Bureau of Labor Statistics."

Therefore, appellee, to have a right to maintain this suit, must prove that appellant had rejected the act, and to do this must first show appellant had filed such a notice with the Bureau named in the act. The original notice without proof of the filing in accordance with the act would not be sufficient. The objection to the notice, that the notice applied to 1912 and not to

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1913, we dispose of with the reasons given for holding that at the time of the accident appellant was operating under the negative election made and not withdrawn.

The objection that the copy is not the best evidence is without merit because we may assume that the Legislature, by providing that the original was to be filed in one of the departments of State created by it, intended to make it a public document subject to the protection and respect such documents are to receive. That would preclude any argument that it is a document of interest only to employer and employee and ready to be produced by either in court at will or upon notice.

The rule is if this became a public document by law, whether judicial or nonjudicial, one which the public has the right to inspect, and one which could not, without inconvenience to the public interests, be removed from its place of custody may be proved by copies exemplified or otherwise duly authenticated. Burr Jones Law of Evidence, vol. 2, sec. 534. This being the law, this copy was not secondary evidence but the best evidence and needed no foundation to support it. Under the common law, without statutory provision, was this notice properly authenticated and entitled to admission in evidence?

This act makes the filing of a notice with the Bureau of Labor Statistics *prima facie* evidence of its execution and by analogy would give like effect to a certified copy thereof, certified to by the person charged with the custody of the original. The notice in this case and its filing with the proper department of State the appellant does not by pleading deny the execution of the notice or filing of same thereby waiving proof either of execution or filing of same.

The notice and the certificate offered in evidence were the best evidence and admissible under the pleadings. Under the contention of appellant as to the ad-

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mission of improper evidence, appellee, over the objection of appellant on redirect examination, asked witness Lloyd Murphy whether or not on this trip of cars there were any lights except what were on the motor. Answer. "There were no lights except those on the motor." Again, with witness Sweet, appellee inquired what was between the cars on this trip to keep the cars from getting loose if they became disconnected or uncoupled. Answer. "There wasn't anything."

The averments of the declaration is the notice to defendant of the charges he has to meet. He is not presumed to meet other or different charges, of statutory violations especially. Appellee concedes this evidence incompetent, but insists it is not reversible error. Our Supreme Court has said: "A plaintiff must recover, if at all," upon the specific acts of negligence alleged in his declaration, "and in the application of this rule to actions for negligence plaintiff cannot allege a specific act of negligence and recover upon proof of negligence of a different character." *Chicago & E. I. R. Co. v. Driscoll*, 176 Ill. 336.

This was not evidence adduced by a witness attempting to explain, but a deliberate attempt to bring forth before the jury evidence of other and further negligence upon which the jury might base a finding. It does not belong to that class of cases cited by appellee which hold although error not reversible error. The appellant complains and assigns as error the giving of appellee's fourth, fifth and sixth instructions.

The fourth instruction is on the measure of damages and the only instruction of the series on that subject, and directs the jury to allow appellee such damages as the jury may find from the greater weight of all the evidence that said widow and next of kin have suffered, not exceeding sum claimed by plaintiff in her declaration.

This instruction is in violation of the statute which limits the recovery to the pecuniary loss of the widow

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and heirs at law, and is the only evidence to be considered on that subject. It is further subject to the objection of keeping before the jury the amount claimed in the declaration, \$10,000, which is not evidence. Appellee concedes this instruction is not in line with authorities, but says it is not reversible error. It will not be necessary to extend this opinion upon this error, but we will adopt what has been said by the Supreme Court in the case of *Illinois Cent. R. Co. v. Johnson*, 221 Ill. 47 and in the case of *Pate v. Gus Blair Big Muddy Coal Co.*, 158 Ill. App. 578, and although in a recent case the Supreme Court held this instruction was not reversible error, it was because it was accompanied by other instructions upon the same subject which correctly stated the law.

The fifth and sixth instructions did not correctly state the law applicable to the pleadings and should not have been given, the fifth referring to plaintiff's case. The plaintiff's case should be confined to the averments of the declaration, and where the declaration sets out in what particular the instrumentalities were unsafe, the jury should not be allowed to speculate what was a safe and what was an unsafe place to work, as was done in the sixth given. On the fifth, see *City of Chicago v. Fields*, 139 Ill. App. 250. On the sixth, see *Nordhaus v. Vandalia R. Co.*, 242 Ill. 166.

The objection as to remarks of counsel is well taken, and while of itself might not reverse this case they materially assist. It is a matter of common knowledge that before the average jury the individual against a corporation is not required to make any sentimental appeal to secure a verdict upon the facts, if he has any facts, and why their representatives will persist in this kind of practice is beyond explanation to the average and distinterested mind. The corporation is entitled to no more but to as much consideration in court as any other party to a law suit. The rules of court and

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ethics of the profession require courteous treatment of parties and witnesses.

The remarks made by counsel for appellee in the argument of the case are in line with those frequently condemned by our courts, and if counsel wish to protect and sustain verdicts it is with them to prevent errors and complaints of this kind. *Pate v. Gus Blair Big Muddy Coal Co.*, 158 Ill. App. 578; *Parlin & Orendorff Co. v. Scott*, 137 Ill. App. 454; *Wabash R. Co. v. Billings*, 212 Ill. 37.

Therefore, on account of the errors above referred to and sustained, judgment will be reversed and the cause remanded.

Reversed and remanded.

Demalain Justice, Appellant, v. John S. Stonecipher et al., Appellees.

1. **BILLS AND NOTES, § 251***—*when person taking note after maturity not chargeable with notice of equities of third person.* A person taking past due paper is chargeable with notice of all equities existing between the original parties to the paper, the makers and payee, but he is not charged with notice of the equities of third persons.

2. **BILLS AND NOTES, § 147***—*sections 52 and 59 of Negotiable Instrument Act construed.* Sections 52 and 59 of the Negotiable Instrument Act., J. & A. ¶¶ 7691, 7698, do not take from nor add to the law as to what constitutes a valid and binding transfer of negotiable paper between indorser and indorsee so far as the rights of innocent purchasers are concerned.

3. **BILLS AND NOTES, § 247***—*when person taking notes through unauthorized transfer takes free from claim of owner.* Where an owner of notes indorsed them in blank and deposited them with a banker for safe-keeping and the banker without authority negotiated them to a third party as collateral security for his own indebtedness, *held* on bill for an accounting filed by the owner against the banker and such third party that though the evidence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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showed the relation of a trusteeship between the owner and the banker such third party took good title to the paper in the absence of evidence showing that he took with knowledge of the banker's claim of ownership.

McBRIDE, J., took no part in the consideration and decision of this case.

Appeal from the Circuit Court of Marion county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914. *Certiorari* allowed by Supreme Court.

BUNDY & WHAM and HOLT & WILSON, for appellant.

KAGY & VANDERVORT, for appellees.

MR. JUSTICE HARRIS delivered the opinion of the court.

The appellant filed in the Circuit Court his bill for accounting against appellee and other respondents. The allegations of the bill, in substance, were: That appellant on the thirteenth day of May, 1912, left with John S. Stonecipher, who was then doing and carrying on a banking business under the name and style of Citizens' Bank of Salem, Illinois, for safe-keeping and return on demand, nine promissory notes amounting to a total of \$2,686, some of which were secured by real estate mortgages and some of which were not, all of which were past due, together with a school order for \$52.50, one certificate of ten shares of stock in the State Bank of Iuka, Illinois, and also several deeds of conveyance to real estate and certain insurance policies, all standing in the name of Demalian Justice and belonging to him; that a demand in writing was made by appellant prior to the commencement of suit upon John S. Stonecipher and the said Citizens' Bank of Salem, Illinois, and that they failed and refused to return to appellant any of the above mentioned papers and securities; that the said John S. Stonecipher, acting either for himself or on account of said Citizens'

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Bank, without authority from appellant and in fraud of his rights, negotiated to the Bridgeport State Bank or to the defendant T. M. Mooney, the Joseph Stanford note and real estate mortgage \$500, the Ed. Beck note unsecured \$300, the W. A. Lowry note and real estate mortgage \$150, the G. M. Abney note and real estate mortgage \$250, the Francis D. Carter note and real estate mortgage \$800, the Albert Jourdan note and bond for a deed in connection therewith \$400, all as collateral security for certain indebtedness owing by said Stonecipher to the Bridgeport State Bank and T. M. Mooney; that the same were all past due and that the said Bridgeport State Bank and T. M. Mooney took and received the said notes and mortgages and each of them subject to all the rights and equities of appellant.

The bill further alleges that said Stonecipher, without authority of appellant and in fraud of his rights, assigned ten shares of Iuka Bank Stock, and that the said Stonecipher collected certain notes and the interest thereon for which he failed to account, which is not involved in this appeal. The bill further alleges that said Stonecipher and the said Citizens' Bank and each of them held the said property in trust for appellant, and should account and turn over to appellant all of said property in their respective hands. The bill alleges that the Bridgeport State Bank was threatening to collect the principal and interest of said notes in their hands and apply the same on the indebtedness of Stonecipher. The prayer was for an accounting with all of said defendants, and to enjoin them from disposing of all the property now in their possession and from collecting either principal or interest; that process was duly served on all parties defendant in said bill; that separate answers were filed to said bill by John S. Stonecipher, The Farmers' and Merchants' National Bank of Nashville, Illinois, T. M. Mooney of Bridgeport, Illinois, The Citizens' Bank and William

A. Mills, trustee in bankruptcy of the estate of John S. Stonecipher, the last named some time after the commencement of this proceeding having entered his appearance and filed answer; that the said defendants and makers of the notes and obligations hereinbefore mentioned, Joseph Stanford, Sarah Stanford, W. A. Lowry, Sallie Lowry, G. M. Abney, Francis D. Carter, Albert Jourdan, State Bank of Iuka, Illinois, and Ed. Beck, were defaulted.

The rights of the several parties, except as between appellant and the Bridgeport State Bank of Bridgeport, Illinois, having been by the decree of the trial court settled, determined and not appealed from will not be in this opinion further discussed or referred to except as it becomes necessary to dispose of the question of right between appellant and the Bridgeport State Bank of Bridgeport, Illinois, appellee.

The Bridgeport State Bank answered the bill of appellant, averring that the notes, mortgages and securities held by it were formerly the property of Demalian Justice, appellant, were indorsed by Demalian Justice and transferred to Stonecipher for a valuable consideration, and that the same became its property in the regular course of its business by purchase for a valuable consideration made in good faith without any knowledge of any claim of Demalian Justice in and to the same. Upon the issue so joined, appellant and appellee offered evidence upon the hearing before the chancellor, and the chancellor found for appellee and entered decree accordingly.

The facts, as they appear from the record that are in dispute, more particularly concern a transaction between appellant and one of the defendants John S. Stonecipher. Appellant on the thirteenth day of May, 1912, went to the place of business of John S. Stonecipher, who had been his personal friend and attorney for years, and left with him his valuable papers. The notes mentioned in the record he indorsed in blank and

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turned over and delivered all the papers to Stonecipher, on that day, Stonecipher at the time delivering to appellant the following receipt:

“\$5439.30. SALEM, ILL., May 13, 1912.

Received of Demalian Justice, Five Thousand Four Hundred Thirty-nine 30/100 Dollars. Deeds to all my real estate including insurance policies on same.

For Collection, Safe-keeping, etc.

No. _____ JOHN S. STONECIPHER."

From the evidence the word "Collection" was erased. Considerable space and time is devoted in the argument as to what was said between appellant and Stonecipher at the time of signing this receipt, and the day previous as to the object and purpose of this transaction, all of which tends to show that both of the parties were persons of considerable business experience and competent to take care of their interest in a business transaction, and which evidence was competent to establish the relation of trusteeship between appellant and Stonecipher, and might be competent in this proceeding against appellee if it was followed by evidence that on June 6, 1912, at the time Stonecipher pledged these notes to appellee as collateral for a loan to him of \$3,000, appellee had knowledge of the claim of appellant as to ownership of these notes, but no such contention appears from the argument nor from the record, and so the only part of the transaction between appellant and Stonecipher affecting the rights of appellee, as between appellee and appellant, is what was the effect of a blank indorsement by appellant, payee in these several notes, and delivery of them to Stonecipher, by him.

The argument of appellant as to consideration of this evidence and the citation of authorities is based upon his statement and quotation of the Statute (Section 59, Chap. 98, Negotiable Instrument Act, J. & A. ¶ 7698), as follows: "Every holder is deemed prima facie to be a holder in due course; but when it is shown

that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." And further quotation from section 52 of the same Act (J. & A. ¶ 7691) as to who is a holder in due course. The two sections of the statute quoted do not take away from nor add to the law as to what constitutes a valid and binding transfer of negotiable paper between indorser and indorsee, so far as the rights of innocent purchasers are concerned. The name of a payee upon the back of a negotiable instrument will transfer the legal title to the same. *Kistner v. Peters*, 223 Ill. 607; *Keenan v. Blue*, 240 Ill. 188. If appellant transferred by indorsement the legal title to these notes and by delivery of the possession of the same to Stonecipher, where in the evidence is there anything showing that the title of Stonecipher was defective? Even the receipt makes no reference to these notes or the indorsement. The fact that three of the notes on the dates of indorsement by Justice to Stonecipher were past due does not affect the validity of the indorsement nor make the title to the paper defective. A person taking past due paper is chargeable with notice of all equities existing between the original parties to the paper, makers and payee, but he is not charged with the equities of third persons. *Y. M. C. A. Gym. Co. v. Rockford Nat. Bank*, 179 Ill. 599; *Schultz v. Saroelowitz*, 191 Ill. 249. There being no evidence showing a defective title to this paper on the sixth day of June, 1912, no burden rested upon the holder, the Bridgeport State Bank, to prove that it or Stonecipher acquired the title in due course. Without a defective title and the burden imposed as a consequence thereof, the contention of appellant becomes a matter between appellant and Stonecipher of a misuse of the paper or the proceeds thereof without the restriction as to its use written into the indorsement and no notice brought

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to the knowledge of the appellee and independent of the rights and equities of the parties to the original undertaking.

The Bridgeport State Bank having a good title to this paper, without knowledge of what the transaction between appellant and Stonecipher was, it becomes immaterial in the determination of the issue here involved. The makers of these notes are making no defense, and as to what defenses they might interpose is likewise immaterial. The rights between appellant and Stonecipher have been by this decree determined: That appellant voluntarily put the power in the hands of his trusted friend, for some reason, by the indorsement and delivery of these notes to dispose of as he saw fit and proper; that he cannot now be heard to say that his own friend and trustee perpetrated a fraud upon him, appellant, which from the evidence was known only to appellant and the person he selected. The party to suffer by such a transaction is the party who puts the wheels in motion and makes such an end possible.

We are of the opinion this decree is right in law and equity. That the Bridgeport State Bank did not take the notes and securities subject to any rights or equities of appellant, but took them in the regular course of business in good faith and for a valuable consideration which has not been satisfied. The judgment and decree will therefore be affirmed.

Affirmed.

MR. JUSTICE McBRIDE took no part in the consideration and decision of this case.

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**Clay Frechett, Administrator, Appellee, v. Illinois
Central Railroad Company, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Pulaski county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

Statement of the Case.

Action by Clay Frechett, administrator of the estate of Lewis W. Johnston, deceased, against the Illinois Central Railroad Company to recover for wrongfully causing the death of deceased.

The declaration consisted of five counts which are distinguished as follows:

The first count simply charges negligence in the handling of the train run at excessive rate of speed in the nighttime, without bell or whistle being sounded and without a headlight.

The second count, and the count under which defendant was found guilty, charges that the railroad of defendant crossed a certain traveled way in said village used by the public as a crossing for pedestrians at a point a short distance north of the passenger station at Ullin and had been so used for fifteen years, and as deceased was traveling as heretofore mentioned, defendant, by its servants, as heretofore mentioned drove a certain train towards the traveled way and while deceased was rightfully traveling upon said traveled way defendant willfully, wantonly and negligently drove and managed said train in that the locomotive was without a headlight, although dark, and was run at a reckless and dangerous speed in Ullin, to wit, forty-five miles per hour, and no bell or whistle sounded, and that by and through the carelessness,

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wantonness and willful negligence Johnston was killed.

The third count charges the traveled way was used by the public by and with consent, acquiescence and invitation of defendant, in other respects similar to the first count.

The fourth count charges a public highway to be at the place where Johnston was killed and negligent operation as in the first count.

The fifth count also charges a public highway and failure to give statutory signals.

Defendant to this declaration filed the plea of not guilty, and upon trial of the issues so joined by a jury a verdict was returned finding defendant guilty as charged in the second count of the declaration and fixing plaintiff's damages at the sum of eight thousand dollars. A motion for new trial was overruled. From a judgment entered on the verdict, defendant appeals.

The facts show that at the place where the deceased was struck by the train the defendant had constructed a cinder walk leading up to its tracks nearly opposite its depot, that the walk had been used by pedestrians and that the deceased on the morning of the accident, before daylight, left his residence to go to his place of business and proceeded along this walk until he came to defendant's tracks and when he attempted to cross the tracks was struck by a through train. There was a controverted question of fact as to the time of the accident and as to what train struck deceased.

L. M. BRADLEY, W. W. BARR and CHARLES E. FEIRICH, for appellant; BLEWETT LEE and W. S. HORTON, of counsel.

WALL & MARTIN and JAMES LINGLE, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

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Abstract of the Decision.

1. PLEADING, § 466*—*when defective count in declaration sufficient after verdict.* A count in a declaration which states a good cause of action in a defective way is good after verdict.

2. RAILROADS, § 583*—*when evidence of wanton or wilful negligence sufficient to go to jury.* In an action against a railroad company to recover for the death of a pedestrian alleged to have been struck by one of defendant's through trains while the deceased was attempting to cross defendant's tracks near its depot, evidence held sufficient to go to the jury on the question whether the defendant was guilty of wanton and willful negligence, it appearing that at the place where deceased attempted to cross the tracks the defendant had constructed a cinder path leading up to its tracks, and that the engine was running at a high and dangerous rate of speed, without a headlight or a bell being rung.

3. RAILROADS, § 577*—*admissibility of evidence.* In an action against a railroad company for wrongfully causing the death of plaintiff's intestate alleged to have resulted through the negligent operation of defendant's train so as to strike the deceased when he was attempting to cross defendant's tracks at a point near defendant's depot, evidence as to the locality, streets and cross-streets, location of depot and acts of the defendant in the building of a cinder walk, tending to prove that the travel of such way was by the defendant's invitation, held properly admitted.

4. RAILROADS, § 593*—*when instruction as to wilful and wanton negligence erroneous.* In an action against a railroad company to recover for the death of a pedestrian alleged to have been caused by being struck by one of defendant's trains while deceased was attempting to cross defendant's railroad tracks, an instruction directing the jury to find for plaintiff if they believed from the evidence that the defendant carelessly and negligently operated its train in the manner and form as charged in the declaration and that such negligence amounted to wanton and wilful negligence, held erroneous as not confining the jury to a count in the declaration in which wanton and wilful negligence was charged and also objectionable as not stating the facts that constitute wanton and wilful negligence.

5. DEATH, § 73*—*when instruction on question of damages objectionable.* In an action for death resulting from wrongful act, an instruction stating that the plaintiff is not required "to furnish, in the proofs, any definite or specific basis for the computation of said damages, but that such question is for the jury to determine as practical men according to the evidence and all the facts

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and circumstances proven in the case," *held* objectionable as not limiting the pecuniary injuries resulting to the widow and next of kin, and the giving of the instruction *held* reversible error.

Henry C. Wahlmann, Administrator, Plaintiff in Error, v. C. Becker Milling Company, Defendant in Error.

1. MASTER AND SERVANT, § 98*—*persons entitled to protection of statute requiring machinery to be guarded.* An employee who is the head miller in a mill and in charge of the machinery, *held* not deprived of the protection of section 89, ch. 48, Hurd's R. S., J. & A. § 5386, requiring machinery to be guarded, for the reason he is a superintendent of the mill, where his care and management of the machinery was subject to the decision of the operators of the mill and besides looking after the machinery it was a part of his duties to work in the mill as a miller.

2. MASTER AND SERVANT, § 98*—*persons charged with statutory duty of guarding machinery.* Section 93, ch. 48, Hurd's R. S., J. & A. § 5390, was intended to require the owner, lessee or person in charge of a mill to remedy defects by placing guards where needed, and it was not intended that the burden should be cast upon an employee, though a machinist, to look after the improvements in the machinery, where the owner and operator of the plant was present and in charge of the operation of the mill.

3. MASTER AND SERVANT, § 98*—*penalty imposed for violation of statute requiring machinery to be guarded.* The penalty imposed on an employer who fails to comply with the statute relating to guarding of machinery is to take away from him the defenses of contributory negligence and assumed risk.

4. MASTER AND SERVANT, § 770*—*when direction of verdict improper.* In an action to recover for the death of an employee in a mill alleged to have been caused by failure of the employer to place guards about a belt and pulley as required by section 89, ch. 48, Hurd's R. S., J. & A. § 5386, a direction of a verdict for defendant on the ground the deceased was such a superintendent of the mill as would deprive him of the benefits of the statute, *held* error where there was evidence that he was an employee whose business it was to not only look after the machinery but to perform work which required him to pass near the belt and pulley.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Error to the Circuit Court of Randolph county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

A. D. RIESS and A. E. CRISLER, for plaintiff in error.

A. C. BOLLINGER, J. M. LASHLEY and H. CLAY HORNER, for defendant in error.

MR. JUSTICE McBRIDE delivered the opinion of the court.

At the close of the trial in the court below the presiding judge directed a verdict for the defendant, and the plaintiff prosecutes this writ of error seeking a reversal of the order made by the lower court. A description of the machinery is not very fully set forth in the evidence as abstracted, but enough appears to show that there were two rolls, one known as the "Nor-dyke roll" and the other "Allis roll." Attached to these rolls were pulleys, one larger than the other, over which pulley belts passed and the whole machinery was operated by steam power. The belts upon these pulleys at times slipped, and upon such occasions it became necessary to apply upon the belt a dope to prevent it from slipping, which was done by spreading this dope on the belt near the pulleys and while the machine was in operation. These pulleys were not guarded and when the deceased, Victor Hahn, was attempting to apply some of this dope to the belt so as to prevent it from slipping, he in some manner was caught between the belt and the pulley and killed. The evidence tends to show that these pulleys should have been guarded by crossbars so as to at least create a less liability of being injured. No one saw the deceased at the time he was caught by the pulleys, and the exact manner in which it was done is not explained, but the evidence tends to show that he was a prudent, careful man about his work. It further appears that

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he was the head miller and had charge of the milling machinery, but the stock of the defendant in error was owned entirely by Conrad and Herman Becker. Conrad was president and Herman, his son, was secretary and treasurer. The business of the defendant in error was transacted by Conrad and Herman Becker, who were present while the mill was in operation and looking after its business. It is said by some of the witnesses that Conrad Becker was manager of the mill and that Hahn was head miller and that: "We took orders from him in regard to the running or repairing of the machinery and Mr. Hahn took his orders from Mr. Becker. He worked for Mr. Becker but I don't know anything about his taking orders from Mr. Becker as to how the machinery should be managed."

The declaration, omitting the formal parts, alleges that the said machines were so located as to expose any employee of the defendant passing or working with the said machines and the said belts and pulleys to the danger of being caught and dragged in and injured by said belts and pulleys, and which said belts and pulleys could practically have been inclosed, fenced or otherwise guarded against such danger, and that it became the duty of the defendant under the statute to properly inclose, fence or otherwise guard the said shafts, pulleys and belts of said machines to protect its employees working with or about said machines from danger of being caught and injured thereby; that the defendant in utter disregard of its duty in this behalf wilfully, carelessly and negligently failed to inclose, fence or otherwise guard such shafting, pulleys or belts in any manner whatever, and that while the said Victor Hahn was in the discharge of his duty as miller was caught by his right arm by one of the said belts and pulleys and injured, from which injury he shortly thereafter died.

It is claimed that the court erred in directing a verdict for the defendant: First, because there was evi-

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dence tending to show that the deceased was an employee of defendant and as such was entitled to the benefit of the statute requiring appellant to guard its machinery and protect its employees; and secondly, that there was evidence tending to show that it was practical to have guarded the machinery in question.

It is contended by counsel for defendant that as deceased was head miller and superintendent of the machinery that it became his duty to place guards about this machinery, and having failed so to do he or his representative could not invoke the benefit of the statute, and this is the principal question to be determined, as the evidence fairly tends to show, and it is not disputed, that it was practical to place guards about this machinery.

In 1909, the Legislature passed an Act to provide for the health, safety and comfort of employees in factories, mercantile establishments, mills and workshops in this State, which became effective on January 1, 1910, the first section of which act provided, among other things: "All dangerous places in or about mercantile establishments, factories, mills or workshops, near to which any employe is obliged to pass, or to be employed shall, where practicable, be properly inclosed, fenced or otherwise guarded. No machine in any factory, mercantile establishment, mill or workshop, shall be used when the same is known to be dangerously defective, and no repairs shall be made to the active mechanism or operative part of any machine when the machine is in motion." Hurd's R. S., ch. 48, sec. 89, (J. & A. ¶ 5386.)

It appears from the evidence that the machinery was installed in this mill in the year 1905 by a Mr. Dorsey who placed the machinery in this mill under the direction of Mr. Becker, and he says: "I superintended the placing of the machinery there. Victor Hahn did not do it. Mr. Becker was the man I dealt with in a business way. He was the man who had to pass on every-

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thing as to the installation of the machinery. He was around there almost every day, both he and his son. I consulted with him about this machinery only in a business way. I employed my men myself. All the superintending that was done there while I was there I did myself. I said that Victor Hahn was superintendent while I was there because Mr. Becker introduced him to me as superintendent and head miller and after the mill started he was the man who instructed the mill hands." The evidence of the other witnesses is to the effect that the Beckers managed and controlled the business and were the executive representatives of this corporation, and while the evidence tends to show that the deceased Victor Hahn was head miller and in charge of the machinery, his care for the machinery and management of it was, as we understand this evidence, at all times subject to the decision and determination of the Beckers. In other words, Hahn was at work for the Beckers at a salary of one hundred and twenty-five dollars per month; his business was to look after the machinery and if anything became out of repair would repair it, but there is nothing in this record to show that he was authorized to install any machinery except as he might obtain authority from the Beckers. His business was confined not only to the looking after the machinery but he worked in the mill as miller, and in fact at the time that he was killed he was engaged at work. It is provided by statute: "If any elevator, machine, electrical apparatus or system of wiring, or any part or parts thereof, in any factory, mercantile establishment, mill or workshop, are in an unsafe condition, or are not properly guarded, where reasonable to guard the same, the owner or lessee, or his agent, superintendent or other person in charge thereof, shall, upon notice from the Chief State Factory Inspector, or the Assistant Chief State Factory Inspector, remedy such unsafe condition within a reasonable time after receiving

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such notice.” Section 93, ch. 48, Hurd’s R. S. (J. & A. ¶ 5390.) The evident intention of this statute is to require the owner, lessee or person in charge of the mill to remedy the defect by placing guards where needed. It certainly was not intended that this burden should be cast upon one, though a machinist, to look after the improvements in the machinery when the owner and operator of the plant was present and in operation of the mill. Especially so in view of the language of the Supreme Court in the case of *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 257, which says: “It imposes upon the master an absolute, specific duty,—one which he cannot delegate and against his neglect of which he ought not to be allowed to contract. If the employee must assume the risk of the employer’s violation of the statute the act is a delusion so far as the protection of the former is concerned.” In the same case the Court further says, in speaking of the effect of this statute that: “The effect of it is to create a new situation in the relation of master and servant, and to present the new question whether the doctrine of assumption of risk heretofore applied to that relation should apply in the same way to the new conditions. The duty of the master has been changed. He may no longer conduct his business in his own way. He may no longer use such machinery and appliances as he chooses. The measure of his duty is no longer reasonable care to furnish a safe place and safe machinery and tools, but in addition to such reasonable care he must use in his business the means and methods required by the statute. The law does not leave to his judgment the reasonableness of enclosing or protecting dangerous machinery, or permit him to expose to increased and unlawful dangers such of his employees as may be driven by force of circumstances to continue in his employ rather than leave it and take chances on securing employment elsewhere under lawful conditions. The guarding of the machinery men-

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tioned in the statute is a duty required of the master for the protection of his workmen, and he owes the specific duty to each person in his employ. To omit it is a misdemeanor subjecting him to a criminal prosecution.”

It is said by counsel for defendant that the cost of repairing or placing of guards over these pulleys would be but a trifle and that the deceased could easily have placed such guards, and that by his failure so to do he became liable for a penalty. We do not believe that a person in charge of the machinery, taking care of it, as the deceased was, would incur a penalty for failure to install machinery that he had not been directed by the master to place therein when the master was actively participating in and managing the business of the going concern. This duty primarily rested upon Becker. The theory that the plaintiff cannot recover because of his failure or neglect to place the guards upon the machinery must be based upon the principle that although he may have been an employee, as he certainly was, he was guilty of negligence and assumed the risk of working with the machinery without guards. But, if this were true, it would not excuse the defendant from doing what the law requires of him, and the penalty imposed upon the defendant is to withdraw from it the defense of contributory negligence and assumed risk. The Supreme Court of this State seems to construe this act the same as the Mining Act, for it says, in the case of *Streeter v. Western Wheeled Scraper Co.*, *supra*: “For many years we have held, in the construction of the Mining Act, that neither assumed risk nor contributory negligence is available as a defense to a suit for damages caused by a wilful violation of the provisions of that act. *Bartlett Coal & Mining Co. v. Roach*, 68 Ill. 174. * * * This law was passed to protect employees, and in view of the construction given to the Mining Act in regard to the assumption of risk, the General Assembly must have

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supposed that the same construction would be given to this act in that regard.” Waiving the question as to the effect that the neglect of the deceased to place guards upon these pulleys would have upon the right of action for his injury, and the limiting of the right of defense of the defendant, yet the evidence shows he was receiving wages and not only looking after the machinery but was performing work, and performed such work as required him to pass near these pulleys, and there was at least evidence tending to show that he was an employee, and the evidence was not of that character that would warrant a court in saying that as a matter of law he was such a superintendent as would deprive him of the benefits of the statute. We think the case should have been submitted to the jury and that the trial court erred in directing a verdict, and the judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

F. W. Cook Brewing Company, Appellant, v. Mike Vaccaro, Appellee.

1. SALES, § 199*—*when title to shipment passes.* Where a contract of sale provides that a shipment shall be f.o.b. cars at the buyer's place of business, a delivery does not take place so as to vest title in the buyer until the shipment is delivered at such place.

2. COMMERCE, § 5*—*when interstate shipments not prohibited.* The citizens of any State have the right to sell and ship any article of commerce to a citizen of another State unless prohibited by Act of Congress.

3. COMMERCE, § 6*—*when importation of intoxicating liquors not prohibited.* Where a person having his place of business in dry territory in this State orders shipments of beer f. o. b. cars at his place of business from a brewery in another State, held such sale and shipment was not prohibited by the Act of Congress passed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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August 8, 1890, nor in violation of the Local Option Act of this State, J. & A. ¶¶ 4637 *et seq.*

4. INTOXICATING LIQUORS, § 268*—*right to recover purchase price of imported liquors.* Where intoxicating liquors are purchased and imported into dry territory in this State, the fact that the seller may have known that it was the intention of the buyer to sell them unlawfully will not bar a recovery by the seller of the purchase price where there is no statute prohibiting a recovery under such conditions.

Appeal from the Circuit Court of Williamson county; the Hon. W. W. CLEMENS, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

HARTWELL & WHITE, for appellant.

SAWYER & OTEY, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

The above entitled causes were consolidated and tried by the court without a jury, by consent, and at the conclusion of the trial the Circuit judge rendered judgment against the plaintiff for costs. The plaintiff appeals and the two cases are by agreement abstracted, argued and tried in this court together. In the abstract the former case is denominated as case No. 272 and the latter case as No. 273. See *post*, 397. The two cases grow out of an order based upon the same contract.

In No. 272, Mike Vaccaro is sued as principal and in No. 273 the appellees are sued as sureties upon the Mike Vaccaro contract. On the seventh day of May, 1909, Mike Vaccaro at Johnston City, Illinois, executed and forwarded to the appellant at Evansville, Indiana, the following agreement, the execution of which was completed on May 9, 1909, at Evansville, Indiana, by the appellant approving and signing the contract:

“This agreement, made and entered into this 7th day of May, 1909, by and between the F. W. Cook

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Brewing Company of Evansville, Indiana, and Mike Vaccaro, witnesseth: That the said Brewing Company hereby agrees to give the said Mike Vaccaro the exclusive privilege of selling its draught and bottled beers at wholesale in said town of Johnston City, Illinois, and agrees to sell and deliver to him its beers f. o. b. cars at Johnston City, Illinois, in carload lots at the following prices: * * * And the said Brewing Company further agrees to pay all freights on empty cooperage, cases and bottles returned to it by the said Mike Vaccaro; furnish ample ice for the preservation of the draught beer in transit; and make allowance and give credit for all bottle beer cases and bottles returned to it. * * *

It is also understood that the said Brewing Company shall not be expected to make any payments or allowances not herein specified. And the said Mike Vaccaro agrees to make settlements and payments whenever demanded by the said Brewing Company or its representatives; take good care of all property of the said Brewing Company intrusted to his care; give special attention to the gathering up and return of all empty cooperage; and that during the continuance of this agreement he will neither sell nor be directly or indirectly interested in the sale of any (beer) other than that of the said Brewing Company.

This agreement shall not be binding upon said Brewing Company until the same has been approved by its President, Vice-President or Secretary and Treasurer, and its corporate seal affixed at Evansville, Indiana. This agreement may be terminated by either party upon ten days notice to the other in writing."

Upon the back of the foregoing instrument there was indorsed an agreement by Domeneco Rodasta and Antonio Vaccaro to stand as sureties: "In a sum not to exceed One Thousand Dollars for the faithful performance by the said Mike Vaccaro of all of the agreements and conditions contained in said agreement, hereby guaranteeing that the said Mike Vaccaro will pay said Brewing Company all sums which shall be-

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come due from him to it for beer sold to him, including cases and bottles, as well as for saloon fixtures and other merchandise. This shall remain a continuing security for the faithful performance by the said Mike Vaccaro of the conditions and agreement above referred to, and the failure of the said Brewing Company to notify the said sureties of any violation of said agreement by said Mike Vaccaro shall not release said sureties from liability for subsequent violations. Dated May 7, 1909."

It is stipulated by the parties herein that as a result of an election under the Local Option Statute of the State of Illinois, Johnston City became dry territory in December, 1907, and remained "dry" until May, 1910. In a letter bearing date of May 7, 1909, Mike Vaccaro, after executing the above contract transmitted it to appellant and in such letter ordered one car of beer to be sent at once, if the bond was satisfactory. Appellant forwarded the beer to Mike Vaccaro and paid the freight thereon to Johnston City, Illinois. Thereafter Mike Vaccaro made frequent orders of carloads of beer, some of which were shipped to him direct and others to the Circolo Popolara Club, as directed by Mike Vaccaro. This shipping of beer continued long after May, 1910, at which time Johnston City again became wet territory. The total shipments of beer made by appellant to Mike Vaccaro amount to \$26,848.20, the last shipment having been made on March 4, 1911. Payments were made upon these shipments from time to time amounting to \$25,287.18; there remained a balance of \$1,560.52 due from Mike Vaccaro to appellant, to recover which these suits were instituted.

We will first dispose of the case against Mike Vaccaro, No. 272, wherein he is sued as principal. The declaration filed consisted of the common-law counts.

It is contended by appellee that as the contract provided that the beer should be furnished f. o. b. cars

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at Johnston City, Illinois, that the title remained in the appellant until its arrival at Johnston City, and that this was a delivery by appellant to appellee at Johnston City and constituted a sale at Johnston City in violation of the local option laws of Illinois, and rendered the contract void, and that no recovery could be had upon such contract for any of the beer so shipped.

We agree with the contention of counsel for appellee, that as the contract provided that the beer should be delivered f. o. b. cars at Johnston City that it contemplated a delivery at this place. There is no doubt but the general rule is that in the absence of an agreement as to the place of delivery that the delivery by the vendor to a common carrier is a delivery to the vendee at the place at which the common carrier received the goods, and that the title to the property vests in the purchaser immediately upon such delivery to the carrier. *City of Carthage v. Duvall*, 202 Ill. 234. If, however, the contract provides that the shipment shall be f. o. b. cars at the vendee's home, or place of business, then the delivery to a common carrier will not be a delivery to the vendee, but it must be delivered to the vendee at his home or place of business before the title is vested in the vendee. *Olson v. Wabash Coal Co.*, 126 Ill. App. 253.

We are in accord with the contention of counsel for appellee that under the contract and payment of freight, etc., by appellant that appellant delivered the beer to the appellee in carload lots, on board the cars at Johnston City, Illinois, and that if such sale was in violation of and prohibited by law then there could be no recovery. It appears from the evidence that the contract was accepted and its execution completed at Evansville, Indiana, and provided for the delivery of the beer f. o. b. cars at Johnston City, Illinois, and the question here presented for our determination is: Does the sale and shipment in the manner herein pro-

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vided violate the local option law of Illinois? As this beer was shipped from the State of Indiana into the State of Illinois, it was undoubtedly an interstate shipment, and for this reason counsel for appellant contends that such shipment and delivery is not in violation of the local option laws of this State, and that it is protected and exempted from the provisions of this statute by the Constitution of the United States, which provides: "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes." It has been uniformly held by the Supreme Court of the United States that the citizens of any state have the right to sell and ship any article of commerce to a citizen of another State, unless prohibited from so doing by Act of Congress. "Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom." *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 493.

It is quite clear, as we think, that until prohibited by Congress, any citizen may ship beer or other articles of commerce from one State into another.

The next question that arises is: What prohibition or regulation had Congress made, if any, prior to the making of this contract, and the shipping of this beer? The only regulation pointed out to us, or that we have in our research been able to find, is an act of Congress passed August 8, 1890, which provides: "That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remain therein for use, consumption, sale or storage therein, shall upon arrival in said State or Territory be subject, to the operation and effect of the law of

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such State or Territory, enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Prior to this enactment of Congress, it was held by the Supreme Court of the United States that in a shipment made by the citizen of one State into another, that so long as it remained in the original package the importer could sell it, notwithstanding such sale was prohibited by a statute of the State into which it was shipped. *Leisy v. Hardin*, 135 U. S. 100. After the passage of the Act of Congress above referred to, it was claimed that by such Act, as soon as the intoxicating liquors came within the borders of the State to which they were imported, that they were at once subject to the control of the State law prohibiting a delivery of them, and a construction of this Act was given by the Supreme Court of the United States in the case of *Rhodes v. State of Iowa*, 170 U. S. 412, in which it is said: "The *Bowman* case [125 U. S. 465] was decided in 1888, the opinion in *Leisy v. Hardin* was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective States to attach to intoxicating liquors coming into the States by interstate shipment, only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named should, whilst retaining the full right to use the same, no longer enjoy the right to sell free from the restrictions as to sale created by State legislation, a right which the decision in *Leisy v. Hardin* had just previously declared to exist." And the Supreme Court, in giving its conclusions in this case further

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says: "We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee, and of course this conclusion renders it entirely unnecessary to consider whether if the act of Congress had submitted the right to make interstate commerce shipments to State control it would be repugnant to the Constitution." Shortly after the adoption of our local option statute (J. & A. ¶¶ 4637*et seq.*) its constitutionality was attacked and many points were presented to the Supreme Court of the State of Illinois regarding its validity, and among them the point was made that the local option act was in violation of the interstate commerce clause of the Federal Constitution, and in passing upon that question the Supreme Court says: "Another point made by the counsel is, that the act violates the interstate commerce clause of the Federal constitution, and although that question is not involved in this case and any invalidity of the provision would not effect the act, the position of counsel is not tenable. In the section designed to prevent evasion of the act it is provided that the taking of orders or the making of agreements in anti-saloon territory for the sale or delivery of intoxicating liquors shall be held to be an unlawful selling. We are required to interpret the act in such a way as to uphold it rather than in a way which would invalidate it (*People ex rel. Columbia Const. Co. v. Hinrichsen*, 161 Ill. 223), and it is always presumed that the legislature did not intend to exceed, and have not, in fact, exceeded, their jurisdiction. (Endlich on Interpretation of Statutes, sec. 171; *Stanton v. City of Chicago*, 154 Ill. 23). It is not necessary every time a law is passed that the legislature should specifically state that there is no intent to interfere with interstate commerce or some other subject of which they have no jurisdiction.

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The act does not purport to control in any manner the importation of liquor from other States.” *People v. McBride*, 234 Ill. 176.

It is contended by counsel for appellee that: “A contract made in one State for the sale of liquor in another, such as would be valid at common law, and which is not shown to be invalid, where made, will enable the seller to obtain an action for the price in the State where delivery is made, notwithstanding, if made in the latter State the contract would have been void. But this rule is of no avail in the face of statutes, such as have been enacted in several States, providing that there shall be no recovery on a contract of this kind when the purchaser buys with a view to violating the laws of his own State, although the contract would have been good where made.” We do not regard this rule of law as applicable, as there is no statute in Illinois prohibiting a recovery under such circumstances. The Supreme Court of Illinois, in passing upon a kindred question with reference to the transportation of liquors from another State into this State, says, in classifying the different kinds of nuisances, enumerates three and says the second consists of: “Those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc.” And later on in the opinion says: “As we view this case, under the stipulations in this record the transaction properly falls within the second class of nuisances as above classified, and could only become a nuisance from the manner in which it might be conducted, managed, etc. The right of the citizen to purchase goods for his own consumption from dealers in other States, and the right to have those goods carried and delivered to him, are to be classed among the highest rights of the citizen, and can only be curtailed when, in the manner of conducting the business, they may endanger the health, life or property of other citizens. There is nothing in in-

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toxicating liquor inherently dangerous. It can only be said to be dangerous to those who use it. It is not like explosives or dangerous drugs, that may carry with them a menace to the persons and property of others, and there is nothing in the stipulation to disclose that the business as conducted was other than the ordinary course in relation to the carrying and delivering of other articles of trade and commerce that might be, and ordinarily are, carried by such companies. In other words, there is nothing to show that in the method of delivery or in the manner of conducting the business there was anything that could be said to be offensive to the public morals or good order, or could in any way tend to disturb anybody in his tranquility of mind, health or body, safety or right of property. In the absence of such showing it cannot be successfully contended that such business or transaction may be declared to be a nuisance." *City of Carthage v. Munsell*, 203 Ill. 478.

From the views above expressed by our Supreme Court, with reference to the business of selling intoxicating liquors, we are of the opinion that even though liquors are purchased and imported into this State that the fact that the vendor may have known that it was the intention of the purchaser to sell them unlawfully, that such knowledge would not bar a recovery by the vendor unless there was a statute prohibiting a recovery under such conditions.

We are of the opinion that the court erred in rendering judgment against the plaintiff for costs, and for the reasons above set forth the judgment is reversed and the cause remanded.

Reversed and remanded.

F. W. Cook Brewing Co. v. Rodasta et al., 188 Ill. App. 397.

F. W. Cook Brewing Company, Appellant, v. Domeneco Rodasta and Antonio Vaccaro, Appellees.

(Not to be reported in full.)

Appeal from the Circuit Court of Williamson county; the Hon. W. W. CLEMENS, Judge presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

Statement of the Case.

Action by F. W. Cook Brewing Company against Domeneco Rodasta and Antonio Vaccaro to recover against the defendants as sureties on a contract between the plaintiff and one Mike Vaccaro, the principal. From a judgment against the plaintiff for costs, plaintiff appeals.

This case and the case of F. W. Cook Brewing Company against the principal, Mike Vaccaro, were consolidated and tried by the lower court without a jury, and on appeal they were consolidated in the Appellate Court. For the reasons set forth in the opinion filed in the case of *F. W. Cook Brewing Co. v. Vaccaro*, ante, p. 387, in which the Appellate Court upheld the validity of the original contract, this case is reversed and remanded.

HARTWELL & WHITE, for appellant.

SAWYER & OTEY, for appellees.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Feehrer et al. v. The Fidelity & Casualty Co., 188 Ill. App. 398.

Charles Feehrer and Anthony Feehrer, Plaintiffs in Error, v. The Fidelity & Casualty Company of New York, Defendant in Error.

INSURANCE, § 397a*—provision in plate glass policy limiting liability construed. A provision in a plate glass policy that the insurance company shall not be liable for any loss or damage resulting directly or indirectly from any inundation, *held* to exempt the company from liability for damages resulting to the glass by persons using row boats during an inundation.

Error to the Circuit Court of Gallatin county; the Hon. ENOCH E. NEWLIN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

BARTLEY & BARTLEY, for plaintiffs in error.

ROEDEL & ROEDEL, for defendant in error.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

This was an action based upon a plate glass policy issued by the defendant to the plaintiffs on March 21, 1913, and was to continue in force until noon of the 21st day of March, 1914. The declaration alleges the issuing of the policy, which provided that in consideration of the sum of \$22.81 the defendant agreed to indemnify plaintiffs, "Against loss or damage of the glass described in the schedule set forth hereon, by breakage and other causes beyond the assured's control."

The declaration further alleges that the foregoing agreement is subject to the following conditions: "Among them is one numbered seven, which provides any loss or damage resulting directly or indirectly from any earthquake or any inundation, insurrection or riot, or usurped power."

The declaration further avers that the plaintiffs are the owners of the property and allege a loss in the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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breakage of glass to the amount of \$197.60, then avers: "That on the first day of April, 1913, the city of Shawneetown was then and there inundated by the Ohio river by reason of said river overflowing its banks and the top of a certain levee or embankment theretofore erected about said city for the protection thereof and its citizens and property from such inundation; that subsequent to said date and prior to the fifth day of said month the said inundation had reached its crest, and had partially inundated the buildings in which said plate glass were then and there located and used as window lights in the windows of said buildings, and the said buildings had become, from the foundation thereof, inundated to a depth of, to wit, from eight to ten feet, and said windows, in which were located the said plate glass, had likewise become inundated to a depth of, to wit, from five to seven feet, from the window sills in which they were respectively located towards the ceiling of the first story of said buildings, several feet, to wit, from four to six feet of said plate glass then and there extending above the surface of the water flowing through said buildings and about the same as the result of said inundation; that from the date of said inundation until the injury to said glass the plate glass was not injured from any cause whatever and the proportion thereof hereinafter mentioned as being above the surface of the water remained exposed to public view; that prior to and on said fifth day of April the waters overflowing said city, by reason of said inundation, had become quiet and in a condition that it was safe for individuals to go from place to place in said city by means of skiffs, rafts and water crafts of a nature capable of being propelled and navigated by means of oars, paddles, * * * and on, to wit, on or about the fifth day of April aforesaid, divers and sundry individuals, whose names are unknown to said plaintiffs, took occasion to then and

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there ride upon the water then submerging said city as aforesaid in skiffs, boats, * * * under their care, control and management, from place to place, and while thus navigating the said water occasioned by said inundation, said individuals in said boats * * * went from place to place within said city and in the vicinity of and to the place where said buildings were then located, and through the negligence and carelessness or recklessness or want of due care in the management of said boats and crafts then being * * * upon said water, ran upon, to and against said plate glass forming windows in said buildings and by means thereof crushed, broke and rendered worthless said plate glass; and divers other parties on or about said date, having in charge boats or water crafts which were dangerous and out of repair and unmanageable and known by said individuals in control thereof to be unmanageable in time to have averted the accident and resulted loss aforesaid, recklessly and carelessly ran to, upon and against said plate glass or some of them and broke, crushed and rendered useless and valueless the same." The declaration then alleges that other individuals knowing that their boats and oars were out of repair, and in a condition that in the natural and proper result of the use of the same the accident to the said plate glass might result, and with knowledge of said fact, in time to have averted the injury and loss did knowingly and carelessly use the same and did negligently run against said plate glass and crush the same. The declaration then alleges that by reason of the premises and the intervention of the acts of said third agencies as aforesaid, breaking the casual connection between the inundation and the injury, the injury and consequential loss is the result of said responsible third agencies, and the plaintiffs aver that the inundation did not improve or immediately set in operation the new chain of causation which resulted as aforesaid. It then alleges the proofs of loss

were made and refusal upon the part of the defendant to pay, upon the pretext that the loss was occasioned or resulted directly or indirectly from an inundation, and from no other cause.

To this declaration the defendant filed a demurrer which was sustained, and the plaintiffs having elected to abide by their declaration judgment was rendered against them for costs, to reverse which judgment the plaintiffs prosecute this writ of error.

The question presented and argued by counsel for plaintiffs in error and defendant in error, hereinafter called plaintiffs and defendant, is as to the liability of the defendant for the breakage of the plate glass by parties rowing in boats upon the streets that were inundated, and while so rowing ran into and destroyed the plate glass in the buildings described in the manner set forth in the declaration. The policy provides that the defendant agrees to indemnify the plaintiffs "Against loss or damage of the glass described in the schedule set forth hereon by breakage from causes beyond the assured's control, etc.," and then further provides that the foregoing agreement is subject to the following conditions, that: "Any loss or damage resulting directly or indirectly from any earthquake or any inundation, insurrection or riot or any military or usurped power." It is argued by counsel for plaintiffs that the condition of the policy of insurance, "which provides that the Company shall not be responsible for any loss or damage resulting directly or indirectly from any earthquake, etc., is not sufficient to bring the loss or damage in the case at bar within the exception therein provided for, before the loss or damage can be said to result directly or indirectly from the inundation described in the declaration, it must appear, as in cases where the loss is by the act of God, that the loss was the sole result of the inundation."

It is further stated in plaintiff's brief at page 13: "So, in this case, the inundation was not the sole cause

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nor a proximate cause, but the acts of the divers parties in running their boats against the plate glass windows was the proximate cause, acting independently of the inundation, the latter being a remote cause or mere condition. * * * The inundation could not in any event be considered the proximate cause of the injury and exculpate the Insurance Company from the performance of its contract.”

We cannot agree with the contention of counsel for plaintiff in their version of the meaning of the terms here employed, to wit: “Resulting directly or indirectly from inundation.” A result may indirectly follow from certain acts or conditions without being the proximate cause, yet they are or may be the indirect results. While the acts of the several individuals (third parties) in rowing their boats against the plate glass windows may have been the direct or proximate cause of the injury, this, however, is not sufficient to relieve from liability, for it must further appear that it did not result indirectly as well. Webster in defining “indirect,” says: “In resulting directly from an act or cause but more or less remotely connected with or growing out of it, as indirect results, damages or claims.” So it would appear that if the injury results indirectly or remotely from the inundation then no liability could attach. It appears to us that the conditions existing in the streets of Shawneetown, the water being several feet deep which permitted the unusual spectacle of people rowing boats in the streets, was a condition that contributed to the results produced by these parties. Were it not for this condition the boats could not have been rowing upon the water in the streets in such manner as to run into the windows, and we are forced to the conclusion that the injuries here sustained resulted, at least indirectly, from the inundation. It is said in the case of *Frisbie v. Fidelity Casualty Co.*, 133 Mo. App. 30: “Where a plate glass

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policy provided for indemnity for breakage, but stipulated that the insurer would not be liable for damages caused as a result of fire, it was held that where a fire occurred in the building and it became necessary to dynamite the building, from which injury to the plate glass resulted, the Insurance Company was not liable as the fire and not the dynamiting was the proximate cause of the injury." And this is also sustained by the case of *Jones v. Metropolitan Casualty Ins. Co.*, 144 Wis. 66.

We do not believe that the language employed in this exception could be misunderstood; it is clear and provides that the defendant shall not be liable for any loss or damage resulting directly or indirectly from any inundation. It was not in the mind of either of the parties to this contract, as we think, to create a liability upon the part of the defendant, where it grew out of a flooding of the streets to the depth of several feet, as alleged in the declaration, and we do not think that the mere fact that the direct act of breaking the plate glass could create the liability in the face of this exception. We are of the opinion that the Circuit Court properly sustained the demurrer to the plaintiffs' declaration, and the judgment is affirmed.

Judgment affirmed.

**August Young, Appellee, v. East St. Louis & Suburban
Railway Company, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of St. Clair county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1914. Reversed. Opinion filed July 28, 1914.

Young v. East St. Louis & Suburban Ry. Co., 188 Ill. App. 403.

Statement of the Case.

Action by August Young against East St. Louis & Suburban Railway Company to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant.

Between the time of the instituting of said suit and the date set for trial plaintiff settled his cause with defendant for the amount of two hundred and seventy-five dollars, and agreed to dismiss his suit and pay the costs. Defendant paid plaintiff the two hundred and seventy-five dollars and plaintiff signed an agreement releasing defendant from any further liability; and it was further provided in said agreement that plaintiff was to dismiss the aforesaid suit at his cost. On the day set for trial the plaintiff failed to appear and a motion was interposed by defendant to dismiss the suit for want of prosecution, and for judgment against the plaintiff for costs, and in support of such motion presented a release and agreement containing the provision above set forth. The court refused to dismiss the suit at cost of plaintiff because it appeared that the plaintiff was insolvent and unable to pay costs, but of its own motion rendered judgment against the defendant for costs. To reverse the judgment, defendant prosecutes this appeal.

BARTHEL, FARMER & KLINGEL, for appellant.

L. P. ZERWECK, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

COSTS, § 14*—*when judgment against defendant on dismissal for want of prosecution erroneous.* Where in a personal injury case the plaintiff failed to appear on the day set for trial and the defendant

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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moved that the suit be dismissed for want of prosecution and for a judgment against plaintiff for costs, and in support of the motion presented a release from liability and an agreement executed by the plaintiff to dismiss the suit and pay the costs, *held* it was the duty of the court to enter judgment against plaintiff for costs unless he had procured an order to prosecute as a poor person, and that the action of the court in entering on its own motion a judgment against defendant for costs, for the reason it appeared that plaintiff was insolvent and unable to pay costs, was improper.

**Town of Canteen, Appellant, v. Fred Weber and
Martha Weber, Appellees.**

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

Statement of the Case.

Action by Town of Canteen against Fred Weber and Martha Weber to recover a penalty under section 71, ch. 121, Hurd's R. S., J. & A. ¶ 9700, for the obstruction of a highway. The charge is that the defendants built a fence in the middle of the road covering one-half of the road and extending about three hundred feet parallel with the road, and that the defendants had been verbally notified, and the defendant Fred Weber notified in writing, to remove the obstruction. It further appeared that the defendants had promised to remove the obstruction in ten days, but that they had failed to do so.

The case was tried before a jury and a verdict was returned finding the defendants not guilty. To reverse the judgment, plaintiff appeals.

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N. C. LYRLA, for appellant.

W. E. KNOWLES, for appellees.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. ROADS AND BRIDGES, § 15*—*period of user to establish highway.* A period of user for fifteen years is all that is required under section 1, ch. 121, Hurd's R. S., J. & A. ¶ 9628, to establish a public highway.

2. ROADS AND BRIDGES, § 11*—*sufficiency of instruction as to establishment of public highway.* An instruction which tells the jury that if a road is used and traveled by the public as a highway and is recognized and kept in repair as such by the highway commissioners, proof of such facts furnish a presumption liable to be rebutted that such road is a public highway, *held* subject to the objection that it does not state the period for which the road must be used to constitute it a public highway.

3. COSTS, § 26*—*when town not liable for costs.* A judgment against a town for costs is improper in a suit by it to recover a penalty for the obstruction of a public highway.

Thomas John et al., Appellees, v. Walter Worthen et al., Appellants.

1. INDEMNITY, § 9*—*when bond not construed to cover past delinquencies.* An indemnity bond will not be construed retroactive in effect or to cover past delinquencies unless it in terms states it is to have such effect.

2. INDEMNITY, § 9*—*when language of bond insufficient to cover past defalcations.* Where a bond given to indemnify sureties on a bond of a county clerk states that if the obligor will save and keep harmless the said county clerk and his sureties from all loss and damage and from payment of any sum of money on account of them or any of them being sureties upon the bond of said county clerk, *held* that the language of the bond did not make the obligor and his

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sureties liable for shortages of the county clerk which occurred before the bond was executed.

3. INDEMNITY, § 24*—*evidence admissible to prove discharge of obligor in indemnity bond.* In an action on a bond given by defendants to indemnify the plaintiffs as sureties on another bond against any loss resulting from defaults of their principal, evidence tending to show that the plaintiffs for a valuable consideration released and discharged their principal from any further liability so far as they were concerned and that they agreed to assume the liability themselves, *held* admissible on the ground that the effect of such an agreement would discharge the defendants.

Appeal from the Circuit Court of Jackson county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded with directions. Opinion filed July 28, 1914.

JOHN M. HERBERT, L. R. STEWART and H. CLAY HORNER, for appellants.

MARTIN & GLENN, for appellees.

MR. JUSTICE McBRIDE delivered the opinion of the court.

This was an action brought by the appellees against the appellants upon an indemnifying bond and at the conclusion of the evidence the court directed a verdict for the plaintiffs. The defendants prosecute this appeal.

It appears from the record in this case that Dan Bower was county clerk of Jackson county; that he was totally blind and had been in that condition for six or seven years, and for some time prior to July 1, 1910, one Zardia Crain had been acting as deputy county clerk for Mr. Bower; that Walter Worthen, who had been a clerk in the office for some time, was appointed deputy clerk, taking the place of Zardia Crain, and on August 13, 1910, the appellants executed and delivered to the appellees a bond in the penal sum of \$5000, payable to the appellees, conditioned, that if the said Walter Worthen, who has been appointed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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deputy county clerk, shall save and keep harmless the said Thomas John and the other appellees, and each and all of them from all loss and damage and from the payment of any sum of money on account of them or any of them being sureties upon the bond of Dan M. Bower as county clerk, and if the said Walter Worthen shall well and truly perform the duties of said office of deputy county clerk, and shall turn over all moneys which may come into his hands by reason of his said office then this obligation to be void. A short time prior to the appointment of Worthen as deputy county clerk it had been ascertained that a shortage of about \$325 existed in said office, which was known to Worthen, but it appears and is claimed by the appellants that the \$325 was not the full amount of shortage at that time but there was then a shortage of over \$1,400, and later on more was discovered and suit was instituted against Dan M. Bower and the appellees as sureties upon the bond of the county clerk, and judgment recovered against them for \$2,843.99, which they claim to have paid. This suit is instituted upon the bond in question for the purpose of recovering the amount that appellees were compelled to pay by reason of having been sureties upon the bond of Dan Bower. It is claimed by appellees that the provision of the bond, to wit: "Shall save and keep harmless the said Thomas John et al., and each of them from all loss and damage and from the payment of any sum of money on account of them or any of them being sureties upon the bond of Dan M. Bower as County Clerk, etc.," creates a liability upon the part of Walter Worthen and his sureties to refund to appellees the amount paid out by them, and the court having adopted this view of the law directed a verdict for the appellees for the full amount claimed. It was claimed by appellants upon the trial of the case that the said Dan M. Bower became a defaulter before they executed the bond in question, and that all or most of the shortage existed prior

to the time of the making of said bond by appellants.

The declaration was in the usual form and the breach assigned was that on November 15, 1906, appellees with others became sureties of the said Dan M. Bower on his official bond as county clerk of the county of Jackson; that said Bower did not keep and observe the conditions of his said bond as county clerk but therein made default and neglected to account for and turn over large sums of money due from him to the county of Jackson, and that a suit was instituted upon the bond of the said Dan M. Bower and appellees as sureties and judgment recovered for \$2,843.99. To this declaration appellants filed several pleas: First. That the writing obligatory sued upon was executed and delivered without any consideration. Second. That the supposed writing obligatory was procured by fraud on the part of the obligees and that the appellants were designedly and fraudulently induced to execute the bond sued upon. The third plea alleges that the obligees in the bond knew that the said Bower was a defaulter and that a fraudulent scheme and conspiracy was formed and appellants tricked into the signing of this bond. The fourth plea alleged that prior to the institution of the suit herein that a settlement was made by the appellees with Dan M. Bower, by which they assumed all further liability upon said bond and released the said Bower from all liability to them as such sureties. Thereafter an additional plea was filed averring that the shortages, defaults and failures of Dan M. Bower accrued prior to the making of the bond sued upon. The third and fourth additional pleas aver payments. The demurrer was sustained to the second additional plea. Upon these pleas issues were formed and the cause tried.

A number of errors have been assigned as having occurred during the trial of this case. The principal one, however, arises upon the admission of evidence and the striking of the first additional plea from the

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files. During the progress of the trial appellants offered to prove that the shortage sought to be recovered, at least a part of it, occurred prior to the execution of the bond sued upon, as averred in the first additional plea. This testimony was objected to, the objection sustained and the evidence excluded from the consideration of the jury. At the close of all of the evidence the court, upon motion of counsel for appellees, struck appellants' first additional plea from the files upon the ground that it did not present a material issue. This plea, in effect, avers that the loss and damage sued for and set forth in plaintiffs' declaration were incurred before the execution of the instrument sued upon. The ruling of the court upon its refusal to admit this evidence and in striking this plea from the files presents the question of the liability of the appellants upon this bond for any losses or defaults that occurred prior to its execution. This is the principal question in this case and presents for our determination the extent of the liability of appellants upon this bond. The language of the bond is that: "If the said Walter Worthen, * * * shall save and keep harmless the said Thomas John et al., and each and all of them from all loss and damage, and from the payment of any sum of money on account of them or any of them being sureties upon the bond of Dan M. Bower." It is claimed by counsel for appellees, and so held by the trial court, that this language made appellants liable, not only for any shortages that occurred after the making of the bond in question and while he was acting as deputy county clerk thereafter, but that it also made appellants liable for all shortages that occurred before the execution of such bond as well. This bond taken as a whole was not an official bond or one required by statute to be given. It was of a dual character, and so far as it undertook to indemnify the appellees against any loss or default of the county clerk, Dan M. Bower, was as to such appel-

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lees merely sureties. In the construction of bonds of this character the courts have repeatedly held that: "A surety is not to be held beyond the precise terms of his contract. His liability is *strictissimi juris*, and cannot be extended by construction." *People v. Toomey*, 122 Ill. 315. "In such case the liability of the surety will not be extended by implication or construction beyond the precise terms of his undertaking, which is to be strictly construed." *Abrahams v. Jones*, 20 Ill. App. 86; *Waters v. Simpson*, 7 Ill. (2 Gilm.) 570; *Ovington v. Smith*, 78 Ill. 250.

Another rule to be observed in the construction of instruments of this character is that the bond will not be retroactive in effect, and does not cover past delinquencies, unless it in terms says that it is to have such effect, so that before an obligation of this character shall be construed as being retroactive it is not sufficient that the language implies a liability but the language must be such as to expressly include such liability in its terms. It is said in the case of *Bartlett v. Wheeler*, 195 Ill. 451: "As a general rule, 'sureties are only liable for the defaults of their principal during the term, for which their bond was given, and after it was given, unless it is retrospective in terms.' (2 Sutherland on Damages,—2d Ed.—sec. 480, and cases referred to in note 1). It is said in Brandt on Suretyship and Guaranty (2d Ed., vol. 2, sec. 526): 'As a general rule, the bond of a public officer has no retroactive effect, and does not cover past delinquencies, unless it in terms says that it is to have such effect.' " See also *Drake v. Sherman*, 179 Ill. 362. The situation of the parties to this agreement or bond at the time it was entered into was that Dan M. Bower was county clerk, was a blind man, and that Walter Worthen had been or was about to be appointed deputy county clerk to take charge of the business. Nothing was said to Worthen or any of his cosureties about incurring any liability for the past conduct of Bower, and no indica-

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tions given of any desire upon the part of the appellees to want indemnity for Bower's past conduct, except such as is claimed is implied by the language of the bond. If any one of the parties to the obligation had any such an idea, as now claimed, it rested with appellees only, and they were by concealment endeavoring to secure themselves against loss which they knew had already occurred, but was not known to the appellants. Under such circumstances they certainly are not entitled to any greater rights against these appellees than the language of the bond by the most strict construction would give them. It is said by counsel for appellants that the words, "On account of them or any of them being sureties upon the bond of Dan M. Bower," are broad enough to cover not only the liability that they were then incurring, or would in the future incur by being sureties, but also the liability that they had incurred by reason of *having been* sureties for him. The language, "Shall save and keep harmless appellees * * * on account of them being sureties upon the bond of Dan M. Bower," should have the construction of saying, inasmuch as you are now on the bond of Dan M. Bower we will save and keep you harmless in the future, and indicated, as we think, an undertaking of liability against any defalcation that may occur in the future. If it had been intended, without concealment, to secure indemnity for retrospective defaults, then the natural and probable language would have been to have saved and kept appellees harmless on account of defaults that may have heretofore occurred or shall hereafter occur, or some such expression of this character to indicate an intention to bind not only for the future but for retrospective defaults as well. We think the fair import of the language of the bond is that appellees should be liable for transactions which should occur in the future, after the bond was executed, and

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nothing more. This contention is well sustained by the case of *Drake v. Sherman*, 179 Ill. 362.

It is also urged as error the action of the court in excluding the testimony tending to show a release, or rather accord and satisfaction, to the appellees made by Bower, whereby it is claimed that for a valuable consideration the appellees released and discharged Bower from any further liability, so far as they were concerned, and assumed the liability themselves. Evidence was offered tending to show such a state of affairs, and we think that this evidence should have gone to the jury under proper instructions, for if an agreement was entered into whereby the appellees discharged Bower, the effect of it would be to also discharge appellants, and we are of the opinion that the court erred in excluding this testimony from the jury.

It is also contended that the court erred in sustaining the demurrer to appellants' second additional plea. We agree with the court that this plea was not sufficient, that it was indefinite and uncertain in its terms and did not by proper averments set up a sale of the office or continuing the office by Worthen under a contract of sale.

Other errors have been assigned, but we do not deem it necessary to consider them, as enough has been said to express our views upon this case, and in another trial we think that the errors heretofore made can be avoided. For the errors pointed out the judgment of the lower court will be reversed with directions to the trial court to set aside the order striking appellants' first additional plea from the files and proceed with the trial in accordance with the views herein expressed.

Judgment reversed and cause remanded with directions.

Hamman v. Illinois Central R. Co., 188 Ill. App. 414.

Royal M. Hamman, Administrator, Appellee, v. Illinois Central Railroad Company, Appellant.

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

Statement of the Case.

Action by Royal M. Hamman, administrator of the estate of Phillip Hamman, deceased, against Illinois Central Railroad Company to recover damages for the death of the deceased caused by being struck by one of defendant's trains at a highway crossing. To reverse a judgment entered on a verdict in favor of plaintiff for four thousand dollars, defendant appeals.

The accident happened at a highway crossing known as the Chartrand Crossing, on what is called the Falling Springs road or avenue, near the southwest limits of the city of East St. Louis. At this place the defendant's railroad consists of three tracks, extending nearly north and south, and are located about thirty feet apart. The east track is called the inbound track, the second the outbound track and the third the yard track. A pair of scales is located upon the yard track and at the distance of about three hundred fifty feet south of the Chartrand Crossing. The Falling Springs highway crosses these tracks at an angle of about thirty degrees, the highway extending nearly northeast and southwest. The tracks are elevated the distance of from four to six feet where this highway crosses them and the center of the highway at the place is graded in such a manner as to make an approach onto these tracks. On the day in question the deceased, Phillip Hamman, and a Mr. Abbot had been engaged at work in a field near this crossing, and it being the

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noon hour had ceased work and were preparing to eat their dinner and from some cause undertook to cross defendant's tracks. A short time before the deceased and Abbot undertook to cross the tracks the defendant's servants passed along this yard track with an engine, going up to the scales for the purpose of weighing the cars. The engine was on the south end of the cars and after weighing them the engine pushed the four cars back to the north and towards Chartrand Crossing, the engine being in the rear with the cars in front, and was running at the rate of from four to six miles an hour. At this time another train was passing along the inbound track going in the same direction, towards the north, at the rate of about fifteen miles per hour and consisted of quite a number of cars, making a train of considerable length. Just before the engine with the four cars reached Chartrand Crossing the deceased and Abbot walked upon the yard track, apparently engaged in watching the train that was passing on the inbound track, and while they were upon the yard track the front car of the train upon that track struck them and killed them.

KRAMER, KRAMER & CAMPBELL, for appellant; JOHN G. DRENNAN, of counsel.

SILAS COOK and LOUIS BEASLEY, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. RAILROADS, § 695*—*sufficiency of averments of negligence.* A count in a declaration averring that while the deceased was walking across the railroad tracks at a public crossing the defendant by its servants so carelessly and improperly drove and managed its engine and train that by and through its negligence the engine was then and there attached to said train of cars backed in front of said

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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engine, and did not have any flagman at said crossing nor any switchman or brakeman on the front car of said train, *held* not subject to the criticism that the negligence charged is not that of careless and improper driving and managing the engine and train, and *held* that it was sufficient to sustain a judgment, especially after verdict.

2. RAILROADS, § 754*—*when question whether failure to look and listen is negligence is for jury.* In an action against a railroad company to recover for the death of a pedestrian at a highway crossing, *held* under the facts of the case it was a question for the jury to determine whether the deceased was negligent in failing to look and listen for the approaching train, it appearing that by looking he could have seen the train approaching, but it also appearing that a train on another track attracted his attention and that the highway ran diagonally across the tracks so that in crossing, his back was nearly towards the approaching train.

3. RAILROADS, § 770*—*when giving of instruction inapplicable to pleadings and evidence reversible error.* In an action against a railroad company to recover for the death of plaintiff's intestate at a highway crossing, the giving of an instruction which directed a verdict and injected into the case the question whether the defendant was running its train over the crossing at a greater speed than usual and than was reasonably safe to persons about to cross the tracks, *held* reversible error where the declaration did not charge and there was no evidence tending to show that the train was running at an unusual or excessive rate of speed.

**Gerret Wilkins, Appellee, v. Madison Coal Corporation,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

Statement of the Case.

Action by Gerret Wilkins against Madison Coal Corporation to recover for personal injuries received by plaintiff on account of a fall of coal from the roof

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wilkins v. Madison Coal Corporation, 188 Ill. App. 416.

of a crosscut in which plaintiff and his buddy were engaged in running a machine used in undercutting coal in defendant's mine. The declaration charged that the defendant wilfully failed to inspect the roof and to observe its dangerous condition and that the mine examiner within twelve hours previously inspected the place and observed the dangerous roof at said point, and wilfully failed to place a conspicuous mark or sign thereat, and wilfully failed to make a daily record of the conditions as required by statute. A jury was waived and trial had before the judge which resulted in a finding and judgment in favor of plaintiff for \$2,999. To reverse the judgment, defendant appeals.

C. H. BURTON, for appellant; JOHN G. DRENNAN, of counsel.

WEBB & WEBB, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. MINES AND MINERALS, § 176*—*when evidence insufficient to show wilful failure to mark dangerous condition of roof of mine.* In an action by a miner to recover for personal injuries received by a fall of coal from the roof of a crosscut in defendant's mine, where the injury was alleged to have been caused by the wilful failure of the mine examiner to observe the dangerous condition of the roof and place a conspicuous mark thereat, *held* that a judgment in favor of plaintiff was not sustained by the evidence, it appearing that the mine examiner had sounded the roof and found no loose condition existing in the roof and that thereafter other employees had sounded the roof and found it solid, and there was no evidence to show that the dangerous condition existed at the time the mine examiner inspected it.

2. MINES AND MINERALS, § 86*—*liability for dangerous condition of roof of mine where examiner failed to discover defect.* A mining

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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company is not liable for injuries resulting from the dangerous condition of the roof of its mine merely because the defect existed at the time the mine examiner inspected and he failed to discover it, where there were no physical facts that were visible or that could be ascertained by the means required by statute and there was nothing to indicate a dangerous condition.

**The People of the State of Illinois for use of Betty
Dunn, Appellee, v. Roy Moore, Appellant.**

(Not to be reported in full.)

Appeal from the County Court of Johnson county; the Hon. J. F. HIGHT, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

Statement of the Case.

Bastardy proceeding by the People of the State of Illinois for the use of Betty Dunn charging Roy Moore with being the father of her bastard child. The trial resulted in a verdict finding the defendant the father of the child and judgment was entered requiring him to pay \$350 for its support. To reverse the judgment defendant appeals.

O. R. MORGAN, for appellant.

H. A. SPANN, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 842*—*sufficiency of certificate that record contains all the evidence.* The making of a certificate that the rec-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Moore, 188 Ill. App. 418.

ord contains all the evidence is a judicial act which must be performed by the judge; a certificate of the reporter cannot be taken as a substitute for the certificate of the judge.

2. APPEAL AND ERROR, § 1269*—*presumption in absence of certificate of trial judge.* Where no certificate of the judge certifying that the record contains all the evidence is incorporated in the bill of exceptions, the Appellate Court must presume that the jury and the court were warranted in finding the verdict and judgment rendered and cannot interfere with such verdict on an appeal.

3. BASTARDS, § 32*—*when presence of child in court room not error.* In a bastardy proceeding it is not improper to have the child present in the court room, and the fact that prosecutrix sat near the jury with the child *held* not prejudicial where the courts on objection of defendant's counsel required her to remove with the child to another part of the room, it appearing there was no effort made to exhibit the child to the jury for their critical examination.

4. BASTARDS, § 25*—*matters of which prosecutrix may not be cross-examined.* Refusing to permit the prosecutrix in a bastardy proceeding to answer questions propounded to her on cross-examination with reference to whether she had ever before had intercourse with other men and with reference to whether she had not on former occasions claimed to be a virtuous woman, *held* not improper.

5. INSTRUCTIONS, § 88*—*when may authorize jury to apply their knowledge and experience.* An instruction authorizing the jury to apply whatever experience and knowledge they may have had in determining the facts of the case, *held* not objectionable.

6. INSTRUCTIONS, § 95*—*when not improper as to credibility of witnesses.* The giving of an instruction which tells the jury that they are not "bound" to believe a fact merely because a witness has testified to it and "should not do so" if from all the facts and circumstances proved the witness is mistaken or testified falsely, *held* not objectionable for the reason that the jury may be led to believe that they are not to consider other evidence.

7. BASTARDS, § 34*—*when instruction proper.* An instruction in a bastardy proceeding which tells the jury that even if the prosecuting witness had intercourse with other persons such fact would not warrant the jury in finding the defendant not guilty, if they believe from a preponderance of the evidence that defendant is the father of the child, *held* to properly state the law.

8. APPEAL AND ERROR, § 1543*—*when giving inaccurate instruction on credibility of witness harmless.* An instruction which states: "You are instructed that the credibility of the witnesses is a question exclusively for the jury; and the law is that where a number of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative, Quarterly, same topic and section number.

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witnesses testify directly opposite to each other the jury are not bound to consider the weight of the evidence as evenly balanced. The jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness and from all the other surrounding circumstances appearing on the trial which witness or witnesses are most worthy of credit and give credit accordingly," *held* subject to the criticism that omits the expression "all the evidence in the case;" but the giving of the instruction *held* not reversible error in view of the other instructions given, and it could not be said that the jury were misled thereby or that a different result would have been reached had the instruction been strictly accurate.

9. **BASTARDS, § 38***—*sufficiency of judgment*. A judgment rendered against the defendant for the support and maintenance of a bastard child, *held* not objectionable as attempting to bind the sureties to pay whatever judgment might be rendered against defendant, where the judgment was rendered against the defendant only.

Iva Dallas, Appellee, v. East St. Louis & Suburban Railway Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed July 28, 1914.

Statement of the Case.

Action by Iva Dallas against East St. Louis & Suburban Railway Company to recover for personal injuries received by plaintiff by falling off one of defendant's cars at a street intersection. The declaration alleged that plaintiff was a passenger on one of defendant's cars, that she went to the rear platform of the car with the intention of alighting at a certain street intersection and that while she was waiting for the car to come to a stop the car was suddenly started forward with a jerk causing her to fall off the car. The plea of the general issue was filed. Upon the trial

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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plaintiff obtained judgment for three thousand dollars. To reverse the judgment, defendant appeals.

WILLIAMSON, BURROUGHS & RYDER, for appellant.

GEERS & GEERS, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

CARRIERS, § 476*—*when evidence insufficient to sustain recovery for injury resulting from sudden jerk of car.* In an action against a street railroad company to recover for personal injuries received by plaintiff by falling off one of defendant's cars at a street intersection, where it was alleged that the plaintiff was standing on the rear platform waiting for the car to stop to enable her to alight and that the defendant negligently started its car forward with a jerk so that she fell off the car, *held* that a verdict for plaintiff was not sustained by the evidence, it not appearing from the evidence other than the testimony of plaintiff that the car was started with a jerk, and her testimony was contradicted by the testimony of the conductor, motorman and several passengers on the car, and several witnesses testified that the plaintiff did not stop on the rear platform but walked right off the car while it was in motion.

W. C. Burk, Appellant, v. Matt Faber, Appellee.

1. **CHATTEL MORTGAGES, § 203***—*when allowing property to remain in possession of mortgagor after maturity is fraudulent.* Where a chattel mortgagee fails to take possession of the mortgaged chattels within a reasonable time after the maturity of the mortgage and allows them to remain in the possession of the mortgagor, such is a fraud as to creditors and purchasers and cannot be explained.

2. **CHATTEL MORTGAGES, § 203***—*when mortgagee's delay in taking possession unreasonable.* Where a chattel mortgagee did not attempt to take possession of the mortgaged property until the sec-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ond day after the mortgage matured, *held* that the delay was unreasonable and that the rights of the mortgagee were thereby postponed to the rights and liens of execution creditors of the mortgagor, where it appeared that the mortgagee and mortgagor lived only three or four miles apart.

3. TRIAL, § 298*—*right to refuse proposition of law embodied in others.* A proposition of law may be properly refused when the same principal is embodied in others which were held to be the law.

Appeal from the Circuit Court of Effingham county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

W. S. HOLMES, for appellant.

H. S. PARKER, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

The appellant brought an action of replevin in the Circuit Court of Effingham County to recover from appellee, the sheriff of said county, the goods and chattels described in the declaration. A jury was waived and trial had by the judge of the Circuit Court, who determined that plaintiff was not entitled to recover the goods and chattels mentioned, and from this judgment the plaintiff prosecutes his appeal.

It appears from the record in this case that on September 9, 1912, William Dunn was indebted to Jacob Todt in the amount of \$1,000, and on that date made and delivered to said Todt his note, with appellant W. C. Burk and S. M. Dye as sureties thereon for the said William Dunn; said note by its terms was to mature one year after date thereof; that on September 11, 1912, the said Dunn executed and delivered to W. C. Burk and S. M. Dye a chattel mortgage upon the property in question to indemnify the said parties as sureties for the said Dunn upon said note. It was pro-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

vided by said mortgage that until default be made by said mortgagor in the payment of said note, it shall be lawful for him to retain possession of the said goods and chattels and enjoy the same; and said mortgage also contained the usual provision with reference to taking possession in the case of a levy or attempted levy of the property described therein.

It further appears from the evidence that on September 8, 1913, A. C. Crays and A. T. Collison obtained two judgments in the Circuit Court of Effingham county by confession against William Dunn et al., one for the sum of \$122.76 and the other for the sum of \$135.57 and costs, and that on September 9, 1913, executions were issued thereon and delivered to the sheriff; that on the ninth of September, 1913, A. C. Crays and A. T. Collison obtained another judgment against William Dunn et al. for the sum of \$206.15 and costs, and caused an execution to be issued thereon and delivered to the sheriff on September 10, 1913.

It further appears from the evidence that the said William Dunn failed to pay the note upon which appellant and Dye were sureties, at its maturity, and that negotiations were going on between Dunn and the said sureties to renew said mortgage, but it was not renewed and the said Burk and Dye did not take possession of the property described in said mortgage until the morning of September 11, 1913; that on September 30, 1913, the appellee, as sheriff of said county, levied upon the goods and chattels described in said mortgage, whereupon the appellant instituted a suit of replevin to recover the possession of such goods and chattels.

The plaintiff filed the usual declaration in a suit of replevin. Defendant filed a plea justifying the taking of such property under the executions above referred to. The court found the issues for the defendant and adjudged the costs against the plaintiff. The appellant claimed that he was entitled to this property be-

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cause he obtained possession thereof without unreasonable delay after the maturity of the mortgage, and that even if there was unreasonable delay that he obtained the possession before the sheriff made a levy under his executions, and that by reason thereof the mortgagee, appellant, was prior in his rights.

The evidence shows that the mortgage matured on September 9, 1913; that the judgments were rendered, some on the eighth and some on the ninth of September, and the executions issued and placed in the hands of the sheriff, some of them on the ninth and some on the tenth of September, 1913, and that levies were made on September 30, 1913.

It further appears that the appellant lived only about three or four miles from William Dunn, the mortgagor, and that appellant did not take or attempt to take possession of the mortgaged property until the second day after the mortgage matured. The Circuit Court held that the delay in taking possession of the property was unreasonable and that the rights of the appellant were thereby postponed to the rights and liens of the execution creditors aforesaid; that it was a fraud *per se*, and not to be explained, to permit the property to remain in the hands of the mortgagor until the second day when no valid reason is shown why possession should not have been taken at once after default. Counsel for appellant claims that as the mortgagee obtained possession of the property before the sheriff levied, that his rights were preserved, and contends that he is sustained in this position by the decision of the Supreme Court in the case of *Pike v. Colvin*, 67 Ill. 227; that appellee would be compelled to collect his debt by garnisheeing the balance that would remain in the hands of the mortgagee after the payment of such mortgage. We do not understand the case referred to as sustaining the contention of counsel. In that case the levy was made before the maturity of the last note and while the property was

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properly in the hands of the mortgagor, under the terms of the mortgage. It would be an entirely different proposition if the grantee permitted his mortgage to become void by reason of not taking possession upon the maturity of the mortgage, and in accordance with its terms. Where the mortgagor is allowed to retain possession of chattels after the maturity of such mortgage, such possession will be considered fraudulent as to creditors and purchasers of the mortgagor. *Jones v. Noel*, 139 Ill. 377.

“Where parties live in the same town or county, one day after default would be a reasonable time within which to take possession of the property so situated, and an agent should be at hand for such purpose.” *Reed v. Eames*, 19 Ill. 594.

A chattel mortgage ceases to be a lien as to third parties if the mortgagee upon default does not take possession. *Slade v. Kurrus*, 133 Ill. App. 99. It is clearly the law that if the mortgagee fails to take possession of the mortgaged property within a reasonable time after the maturity of the mortgage, and it is allowed to remain in the possession of the mortgagor, that such is a fraud as to creditors and purchasers, and such a fraud as cannot be explained. The Circuit Court determined that the time that the mortgagee permitted this property to remain in the hands of the mortgagor, after the maturity of the mortgage, and before attempting to take possession of it, was unreasonable and rendered the mortgage void as to the creditors in said executions, and we see no reason for disturbing this finding of the trial court.

It is contended by counsel for appellant that the court erred in refusing appellant's second, fourth, fifth and sixth propositions of law asked by the plaintiff, and contends that the second proposition submitted, that the mortgagee had a reasonable time to take possession of the property after the maturity of the mortgage, was erroneously refused. In this counsel is mis-

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taken, as that proposition was included in the third, which was held by the trial judge to be the law; but the second, fourth, fifth and sixth propositions of law embodied the principles herein contended for by appellant to be the law, and we think the Circuit Court properly refused all of said propositions for the reasons hereinabove set forth. During the time that the sheriff, appellee, held the executions and before the mortgagee took possession of the property, the mortgage became void, being fraudulent as to creditors, and immediately upon its becoming void the rights of the creditors then took precedence over those of the mortgagee and it became the duty of the sheriff to levy the executions upon the property of William Dunn, and, if necessary, to take this property from any one who held it unlawfully as against the creditors.

We are of the opinion that the findings and holdings of the Circuit Court are in conformity with the decisions of the Supreme Court of this State and that no reversible error was committed in the trial of this case, and the judgment of the lower court is affirmed.

Judgment affirmed.

John T. Smith for use of L. F. Karle, Appellee, v. Vandalla Railroad Company, Appellant.

1. PARTIES, § 13*—*effect of suit in the name of one for the use of another.* Where a suit is brought in the name of one person "for the use" of another, the former is the plaintiff, and the words, "for the use, etc.," are surplusage, having no effect upon the suit and are of no concern to the defendant.

2. APPEAL AND ERROR, § 1231*—*when splitting cause of action cannot be complained of.* The fact that plaintiff split his demands by bringing suit for a less sum than was actually due cannot be complained of by the defendant on appeal from the judgment re-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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covered against him, since he is entitled to set up the judgment in bar of any subsequent suit to recover the balance of the demand.

3. PARTIES, § 43*—*when mistake in name of plaintiff may be amended.* Where after a verdict has been rendered an error is discovered in the middle initial of plaintiff's name, the court may, upon motion of plaintiff, before final judgment permit the amendment of the summons and pleadings so as to show that the suit was brought in his true name.

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

WHITNEL & BROWNING, for appellant; FORDYCE, HOLLIDAY & WHITE, of counsel.

DAN MCGLYNN, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

This is an appeal from a judgment rendered by the City Court of East St. Louis. The record in this case discloses that John T. Smith was engaged at work for the appellant during the months of November and December, 1912, and that there was due him from the Company as wages \$77 and a few cents. John T. Smith was indebted to L. F. Karle, who brought suit against J. T. Smith in the name of J. H. Smith before George A. Boyne, a justice of the peace in East St. Louis, and a garnishment was served upon appellant to subject the wages of J. T. Smith to the payment of Karle's claim; that on December 10, 1912, John T. Smith signed an order drawn on the appellant, Vandalla Railroad Company, in favor of George A. Boyne, justice aforesaid, for \$46.45, for the purpose of paying the claim of Karle against John T. Smith. Upon receiving this order Boyne mailed the same to the attorneys of the appellant, but the order was afterwards returned to Boyne and left upon his desk. Karle took the order and had a talk with John T. Smith about it

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and Smith told him to bring suit against the Company. He said he had done all he could do. Thereupon L. F. Karle brought suit in the name of J. H. Smith for the use of Louis F. Karle against the appellant for \$56.45, being the amount of his claim. The only evidence introduced upon the trial of the case with reference to the claim was that of John T. Smith, who said that appellant was indebted to him in the amount of \$77, and that at the time of the garnishment it was indebted to the amount of \$67; that he gave the order to Justice of the Peace Boyne for the purpose of settling the claim of Karle. At the close of plaintiff's evidence the defendant asked the court to direct a verdict in its favor, which the court refused to do, and thereupon the defendant refused to offer any further testimony and the trial court, upon the motion of the plaintiff, directed a verdict for the plaintiff for the amount of \$56.45. After the verdict had been rendered it was discovered that the true name of the plaintiff was John T. Smith instead of John H. Smith, and thereupon the court, upon the motion of appellee, permitted an amendment of the summons and pleadings so as to show that the suit was in the name of John T. Smith instead of John H. Smith. Judgment was rendered upon this verdict, to reverse which this appeal is prosecuted. It is not denied by appellant in this case but that it was indebted to John T. Smith in the sum of more than \$56.45, but contends that this is an effort upon the part of John T. Smith to transfer to Karle a part of the claim and retain a portion of it for himself, and that the effect of it is a splitting of the demand of John T. Smith against appellant, and for that reason this suit cannot be maintained. The idea of counsel for appellant seems to be that this is a suit of Karle, because it is brought in the name of John T. Smith for the use of Karle. As we view the law the fact that the suit is brought in the name of John T. Smith for the use of Karle does not make Karle the

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plaintiff, but John T. Smith the plaintiff, and the words, "for the use of Karle," are surplusage and could only control the relations existing between Smith and Karle. The words, "for the use, etc.," are unnecessary for any purpose other than to protect the interests of the usee against the nominal plaintiff." *Tedrick v. Wells*, 152 Ill. 217.

Where a party brings a suit in his own name for the use of another party, the words, "for the use, etc.," are surplusage. He need not name any one as the usee, but if he does it has no effect upon the suit. *Schiff v. Supreme Lodge Order Mut. Protection*, 64 Ill. App. 341. Where a suit is brought by a plaintiff for the use of another the defendant has no concern with the use. *Schiff v. Supreme Lodge Order Mut. Protection*, *supra*.

Again it is insisted by appellant that this is a splitting of appellee's demands and might result in a multiplicity of suits against the appellant, whereas it could all be recovered in one action. The position of counsel that it would result in a splitting of demands seems to us to be well taken, but we do not agree with them as to the effect of it. It is no concern of the appellant as to how much is included in appellee's judgment so long as it does not undertake to recover more than is due to him. This action was commenced before a justice of the peace, and under the statute he would have to include all claims existing against appellant at the time the suit was brought. If, however, in a suit brought, less than the whole amount due was claimed or demanded, the fact that he had failed to sue for the whole amount and was taking judgment for less than was actually due could not be complained of by the appellant in that suit. If, however, the appellee should attempt to bring another action against appellant for the balance of his claim or demand, then appellant could very justly and properly invoke the doctrine here contended for and plead the former judgment in bar. *Calverley v. Steckler*, 126 Ill. App. 586. We do not

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think that appellant has any right to complain because suit is brought for a less amount than is actually due, and set such fact up as a bar to the action.

It is further contended by counsel for appellant in its reply brief that if appellee's contention, that this is not a suit by Karle but is a suit by John T. Smith, is true, then under the fourth error assigned, this cause should be reversed as the suit was brought in the name of John H. Smith for the use of Karle, and counsel for appellee was permitted to amend the original summons so as to make John T. Smith plaintiff, after the verdict had been returned. We cannot see any objection or reason why the court should not have permitted this amendment under the statutes of this State, both under section 1 of chapter 7 (J. & A. ¶ 300), and section 42 of chapter 79. (J. & A. ¶ 6903.) The court may, at the request of either party, at any time before final judgment, amend the summons and other papers in the case so as to make the same conform to the true names of the plaintiff and the defendant. We cannot see how appellant is in any manner injured by this amendment or by this judgment. It appears from the evidence, and is not denied, that the appellant is indebted to John T. Smith for even more than the judgment, and we believe the court ruled properly in directing a judgment against it for the amount sued for.

The judgment of the lower court is affirmed.

Judgment affirmed.

W. B. Martin & Son v. Lamkin, 188 Ill. App. 431.

W. B. Martin & Son, Appellants, v. Mary Lamkin, Executrix, Appellee.

1. **PRINCIPAL AND AGENT, § 5a***—*when contract creates relation.* A contract whereby a real estate agent is to have as his commissions all he obtains for the land above a fixed price creates the relation of principal and agent.

2. **PRINCIPAL AND AGENT, § 11***—*when agency revocable.* Unless an agency is coupled with an interest the principal may revoke it at any time, being liable for the damages sustained, and this rule applies though the appointment is by its terms made irrevocable.

3. **PRINCIPAL AND AGENT, § 12***—*when agency is not coupled with an interest.* An agents authority to sell land is not coupled with an interest in the land so as to be irrevocable by his principal where the interest of the agent could only arise out of the execution of the power and in the proceeds derived from the sale as a compensation for his services in its execution.

4. **BROKERS, § 19***—*when authority to sell real estate revoked by death of owner.* A contract between real estate agents and an owner of land whereby the agents were to have as commissions all they could obtain for the land above a fixed price, held not to create an authority to sell, coupled with an interest in the land, so that the agency would not be revoked by death of the owner.

Appeal from the Circuit Court of Saline county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

WHITLEY & COMBE, for appellants.

W. F. SCOTT, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

This was a suit brought by appellants against the appellee to recover commissions for the sale of real estate. At the conclusion of appellants' evidence the court directed a verdict for the appellee.

Fred Lamkin was the owner of one hundred and sixty acres of land in Saline county and on the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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twentieth day of May, 1912, authorized appellants, who were engaged in the real estate business, to sell the land. A Mr. Gersbacher, at the solicitation of appellants, went to examine this land on about the first day of June, 1912, with a view of purchasing it. He did not see Mr. Lamkin upon this trip, or at any time, but the appellants priced the land to him at ninety dollars per acre. He did not purchase it but went to his home, in White county, without making a contract. On July 13, 1912, Fred Lamkin died testate and devised this real estate to his widow, and on July 16th the widow, as executrix caused notice to be served upon appellants directing them not to sell the land in question. On July 23, 1912, Gersbacher came back to see the appellants about purchasing this land and again went to look at it and claims to have made a contract with appellants at that time for the land. Appellants offered to show that after the death of Fred Lamkin and on about July 23, 1912, he made a contract with Gersbacher for sale of this land at the price of thirteen thousand five hundred dollars, being fifteen hundred dollars in excess of the price for which they had been authorized by Lamkin to sell the land. They also offered to show by Gersbacher that he was at that time ready, able and willing to have paid the full amount of the purchase price. This testimony was objected to and the objection sustained. The contract or appointment authorizing appellants to sell the land in question was as follows:

“I, Fred Lamkin, authorize and employ W. B. Martin & Son to sell the following described Real Estate, situated in the County of Saline and State of Illinois, to-wit: S E $\frac{1}{4}$ of S W $\frac{1}{4}$, and S W $\frac{1}{4}$ of S E $\frac{1}{4}$ of Section 35-8-6; also the east $\frac{1}{2}$ of the N W $\frac{1}{4}$ excepting about 5 acres south and east of the N. Y. Central R. R., and about five acres north and west of the N. Y. Central R. R. in E $\frac{1}{2}$ of S W $\frac{1}{4}$, all in Section 2-9-6 E. of 3rd P. M., for the sum of Twelve Thousand

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Dollars, and upon the following terms, to-wit: Coal reserved with right to mine and remove same. Scales reserved. Terms as agreed, and I promise to pay said agents all over \$12,000 commission on the amount of said Real Estate or any part thereof may bring when sold, and after the expiration of this contract if sale or trade is made to any party previously seen or influenced in any way by said agents I promise to pay said agents the same commission as above stated and will use all means in my power to assist in the sale of said property, but will not sell for a less price or on easier terms than above stated, and agree with said agent not to sell or otherwise dispose of the above described Real Estate without the written consent of said agents. If sale is made I agree to make a Warranty Deed to whomever said agents may say, and furnish said purchaser an abstract of title to said land, showing a fee simple title in me.

This instrument to remain in full force until Sept. 1st, 1912, and thereafter until I give said agents written notice of withdrawal from sale.

Witness my hand and seal this 29th day of May, A. D. 1912.

(Signed) F. Lamkin. (Seal)''

The claim filed by appellants against the estate of Fred Lamkin is as follows:

“December 1, 1912.

Estate of Frederick Lamkin, Dr.

To W. B. Martin, Ray Martin and Guy Martin, partners doing business under the firm name and style of W. B. Martin & Sons.

For commissions on sale of land and securing purchaser for land, per terms of written contract, \$1,500.00.”

By direction of the trial court a verdict was returned for appellee.

The real question involved in this case, as we view it, is: Did the appellants have the right to sell this

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land under the appointment above noted, after the death of Fred Lamkin, and after the executrix had notified them not to sell? The case was tried by the appellee and determined by the lower court upon the theory that the death of Frederick Lamkin revoked the authority of appellants to sell the land and that any sale made by them after the death, and after the notice by the executrix not to sell, was without authority of law. It will be observed that, by the terms of this appointment, Frederick Lamkin agreed to pay appellants, as agents, a commission upon the sale of said land all over twelve thousand dollars for which they sold the land, and that the instrument was to remain in full force until September 1, 1912. As we understand the law, a contract whereby a real estate agent is to have as his commissions all he obtains for the land above a fixed price, creates the relation of principal and agent. *Burnett v. Potts*, 236 Ill. 499. If appellants were the agents of Lamkin to sell this land, then under the law the death of Lamkin revoked the agency, unless the authority to sell is coupled with an interest in the land. A. & E. Encyc. of Law, vol. 1, p. 1222. This is the general rule, and as we understand the decisions of the higher courts of this State they are to the effect that unless the agency is coupled with an interest the principal may revoke it at any time, being liable for any damages sustained. *Bonney v. Smith*, 17 Ill. 531. And this power of revocation may extend to appointments that are by their terms made irrevocable. *Walker v. Denison*, 86 Ill. 142.

It is insisted by counsel for appellants that the present case does not come within the rule above invoked for the reason that appellants' appointment was coupled with an interest and for a valuable consideration, and being so was irrevocable. We do not understand that there was any consideration given for this appointment or any specific obligation incurred by appellants by reason thereof. They were not by the

terms of the appointment bound to do anything, but it was left at their pleasure whether they would or would not sell the land. If they did make the sale then they were to get the commission. In order to determine whether or not this was a power coupled with an interest, it is necessary to ascertain what is meant by the courts, in the use of this term. In the case of *Bonney v. Smith*, supra, it is said: "A power, coupled with an interest, must create an interest in the thing itself upon which the power is to operate; the power and estate must be united, or be coexistent, and this class of powers survive the principal and may be executed in the name of the attorney * * *. Another class of powers is where they are created upon a valuable consideration, and to operate as a transfer, mortgage or security to another, although the power can only be executed in the name of the principal * * *. These are irrevocable by the act of the principal, * * * and created to subserve purposes in which another has an interest. Another class is where the attorney has an interest only arising out of the execution of the power, as in the proceeds, as a compensation for the business of its execution. 8 Wheaton, 174; 2 Kent's Com. 644. This power is of the latter class, and revocable by the principal, although the principal might perhaps be liable to the agent or attorney for any damages sustained. It is a naked power, with an interest in the proceeds, based only upon its execution, which execution is dependent upon the continuing will of the principal." And in this opinion Mr. Story on agency is quoted at length confirming the doctrine announced. Again in the case of *Walker v. Denison*, 86 Ill. 146, it is said: "As to the exception of a power coupled with an interest, it is not enough, as appellant supposed, that the agent has an interest in the execution of the power. The meaning of that expression underwent discussion and was authoritatively determined in the case of *Hunt v. Rousmanier's Administrator*, 8

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Wheat. 174, where it was held that 'a power coupled with an interest' is where the power or authority is coupled with an interest in the thing itself, actually vested in the agent; and that it was not an interest in that which is produced by the exercise of the power." Chief Justice Marshall in the decision of the case of *Hunt v. Rousmanier's Adm'r*, *supra*, in speaking of the general rule says: "That a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' which survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself." Counsel for appellants have cited cases which seem to hold that under circumstances where the agent has a contract for a definite period of time, and has expended money procuring a purchaser, and at about the time the purchaser was procured and after the owner had been advised that the sale was about consummated, that such agency under such circumstances could not be revoked, and the agent defeated in the collection of his commission. We can readily see that the attempted revocation under such circumstances would be a fraud upon the rights of the agent, but an entirely different question arises in the present case. There could be no fraud, as the revocation was based upon the death of Lamkin, and we think the cases referred to by counsel for appellants have no application to the present case. We are of the opinion that the death of Frederick Lamkin revoked the agency of appellants and that their appointment was not

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coupled with an interest in the land but their interest could only arise out of the execution of the power and in the proceeds as a compensation for their services in its execution, and that as the agency had been revoked by operation of law the contract of sale offered to be shown as having been made after the death of Lamkin was a nullity, and that as no sale had been made the commission claimed had not been earned under the terms of the contract, and that appellants are not entitled to recover the commissions claimed.

Again it is said by counsel for appellant that the appellants were entitled to compensation for the services that were actually performed by them under the appointment and before its revocation. This may be true, but if it is, no such question arose upon the record in this case. The claim made by appellants is not for compensation for the services rendered but is: "For commissions on sale of land and securing purchaser for land, per terms of written contract, \$1,500.00."

There is no evidence offered, showing or tending to show the value of the services rendered, and, as we view it, there was only the one question presented to the trial court, and reviewable here, and that is, whether or not a sale was made and the appellants entitled to the commissions contracted for.

We are of the opinion that the court did not err in excluding the proffered testimony and in directing a verdict for the appellee, and the judgment of the lower court is affirmed.

Judgment affirmed.

Rone v. Robinson, 188 Ill. App. 438.

Everett Rone, Administrator, Appellant, v. Martha E. Robinson, Appellee.

1. EXECUTORS AND ADMINISTRATORS, § 92*—*when proceeding by citation inappropriate remedy.* A proceeding by citation under sections 81 and 82 of the Administration Act, J. & A ¶¶ 130, 131, is not the proper remedy to try a contested claim of ownership to property.

2. GIFTS, § 9*—*sufficiency of delivery to constitute gift inter vivos.* To constitute a valid gift *inter vivos* there must be a complete delivery of the property, that is, such a change of possession as to put it out of the power of the giver to repossess himself of the thing given, and the delivery must be made with the intent to vest title in the donee.

3. GIFTS, § 15*—*when gift inter vivos of certificate of deposit valid.* Where a person in his lifetime gave his money to his daughter's husband to deposit in a bank in her own name for the purpose of making a gift of the money to her, and the husband did so and took a certificate of deposit which recited that the money was deposited in her name, but beneath the signature of the cashier of the bank it further stated in the case of her death before the death of the donor the certificate becomes the property of the donor, *held* under all the evidence in the case that the transaction constituted a valid gift *inter vivos*, it appearing that the certificate was delivered by the donor to his daughter without anything said as to his right to repossess himself of the certificate, and that the writing on the certificate beneath the signature of the cashier was placed there on the proposal of the husband without any solicitation on the part of the donor.

4. TRIAL, § 302*—*authority of court to modify propositions of law.* Under section 61, ch. 110, Hurd's R. S., J. & A. ¶ 8598, the trial court has authority to modify propositions of law.

Appeal from the Circuit Court of Franklin county; the Hon. JACOB R. CREIGHTON, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914.

W. B. JOHNSON, W. H. HART and MOONEYHAM & SEEGER, for appellant.

SPILLER & MILLER, W. S. CANTRELL and G. A. HICKMAN, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE McBRIDE delivered the opinion of the court.

This was an action of assumpsit instituted by the appellant in the Circuit Court of Franklin county, Illinois. Upon a trial had without a jury the court found the issues for the appellee and rendered judgment against appellant for costs, to reverse which this appeal is prosecuted.

It also appears from the record that a citation had been issued by the County Court of Franklin county against appellee requiring her to surrender to the appellant the certificate or check in question, and by agreement of the parties the cases were consolidated and are submitted to this court as a consolidated case.

It appears from the record in this case that the citation was originally issued by the County Court of Franklin county against appellee under sections 81 and 82, chapter 3 of the Revised Statutes of Illinois (J. & A. §§ 130, 131), directing and requiring her to surrender the certificate hereinafter described. The petition was dismissed by the County Court, from which order the appellant prosecuted an appeal to the Circuit Court, and thereupon instituted at the same term of court an action of assumpsit against the appellee, filing a declaration consisting of the common counts, and at the November Term, 1913, the two cases were consolidated, jury waived and tried before the Circuit Judge. On February 5, 1913, Ivan Jackson was the owner of twelve hundred dollars in money, part of which was in his possession and control, having been placed in tin cans which were secreted at different places, and part in a pocketbook which he kept in a bureau drawer, and part of it appears to have been under the control of and secreted by the appellee. Shortly before the fifth of February, Ivan Jackson had determined to give this money to his daughter, Martha E. Robinson, the appellee herein, and so told her husband, John Robinson, whom he selected to help him gather this money together and

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told Robinson that he wanted to give it to the appellee and to deposit it in a bank in her name so that she would be sure to get it. During the period in which they were engaged in gathering the money together and counting it, John Robinson suggested to Ivan Jackson that he was getting old and that the appellee might die before he did and that he would put a clause in the certificate to protect Ivan Jackson in case of her death. After the money had been collected together Ivan Jackson gave it to John Robinson and told him to deposit it in the bank and make the check or certificate payable to appellee. This was done, the money was deposited in the Farmers Exchange Bank and the following certificate issued:

“\$1200.

No. 186

Farmers Exchange Bank

Akin, Ill., Feb. 5, 1913.

Martha E. Robinson has deposited in this bank Twelve hundred dollars, payable to herself in current funds, six months after date on return of this certificate properly endorsed, with interest at the rate of four per cent per annum. No interest after maturity.

John B. McGuyer,

Cashier.

Certificate of deposit subject to check. In case of the death of Martha E. Robinson, before the death of Ivan Jackson, this certificate of deposit becomes the property of Ivan Jackson.”

The certificate of deposit was taken by John Robinson to Ivan Jackson, who, after having it read to him turned it over to appellee and said: “Take that and put it away, it was yours.” The check was received by appellee and kept by her. On July 10, 1913, Ivan Jackson died and this suit is brought to recover the money from the appellee.

The evidence introduced, the argument of counsel, and, in fact, the whole trial of this case has been con-

ducted along the lines that appellee was in good faith claiming to be the owner of this certificate of deposit, and that appellant claimed that it had never been delivered to her, and, as we understand it, was purely a contest of the right of ownership of this certificate, and being a contest as to its ownership we do not think that the citation, under sections 81 and 82, is the proper remedy to try a contested question of this character. "The summary proceedings in the probate court to compel the production and delivery of property 'is not the proper remedy * * * to try contested rights and title to property between the executor and others.'" *Dinsmoor v. Bressler*, 164 Ill. 211.

"If sections 81 and 82 could be used to settle contested rights to property as between executors and administrators on the one side and third persons on the other, they would operate as an infringement upon the constitutional right to trial by jury, as they contain no provision for a jury trial." *Moore v. Brandenburg*, 248 Ill. 240.

"The statute is not designed to afford the means of collecting debts due to estates (*Williams v Conley*, 20 Ill. 643), nor to try contested rights and title to property between the executors and others. (*Dinsmoor v. Bressler, supra.*)" *Moore v. Brandenburg, supra.* This same doctrine is fully recognized in *Martin v Martin*, 170 Ill. 18. We do not believe that this was a proper case for the summary proceedings under sections 81 and 82 of chapter 3, and are of the opinion that the court did right in dismissing the petition. The real question that is presented by this record is, as to the delivery of the certificate of deposit by Ivan Jackson to the appellee. The different views presented by counsel are concerned more with the facts and the application thereof to the law rather than the law itself. Indeed there can be little dispute as to what the law is, as we think it is well settled that to constitute a valid gift *inter vivos* there must be a complete

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delivery of the property, such a change of possession as to put it out of the power of the giver to repossess himself of the thing given, and the delivery must be made with the intent to vest the title in the donee. *Telford v. Patton*, 144 Ill. 611. The question here is, was there such a delivery of this certificate? To determine this question it is necessary to take into consideration all of the actions of the parties and the facts preceding and attending the delivery of this check, together with the declarations made by Ivan Jackson after its delivery. It is very clear from this testimony that Ivan Jackson desired to give his daughter, the appellee, the money in question, and it became with him a matter of how to deliver it so that it could not be taken away from her. The money was scattered around the house, in the smokehouse, hidden in the yard, in old cans, and in various places, and it became necessary for him to collect this money together. There was two hundred dollars of it in gold, at least, that seems to have been under the control of appellee and it was secreted by her in a tin can in the yard. John Robinson, the husband of appellee, was taken into the confidence of Jackson and assisted in collecting this money together, and during this time Jackson said to him: "Now I want that money counted and took to the bank and I want to give it to Martha (appellee); he said I don't know how much there is of it but whatever you take to the bank I want it deposited in her name. He called it a check and he said, I want the check made payable to her." That was on the night before the money was deposited. "He said for me to take it to wherever I pleased and deposit it." Witness says: "I cannot tell you how much was in Mr. Jackson's possession or in my wife's possession." Witness further says, that he told Jackson: "If you want to deposit it in her name I will put this clause in the certificate of deposit, in the case of my wife's death before your death it becomes your property

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again. My wife was not present when I made this statement to Ivan Jackson. Jackson would say he wanted me to take it and deposit it in the bank in my wife's name so she would be sure and get it. I took it to the bank and got a certificate of deposit that was shown here as Exhibit A." Mr. Guyer, cashier of the bank, testified that when Robinson brought the money to deposit it that he said he had some money he wanted to deposit and wanted to deposit in Martha E. Robinson's name and wanted a clause in that certificate providing that if Martha E. Robinson died prior to the death of Ivan Jackson it was to go to Ivan Jackson. The certificate of deposit was issued by the cashier and made payable to her order in current funds, signed by the cashier. Following the signature of the cashier, but not included as a part of the certificate, unless placing it upon the same paper makes it such, are the words: "In case of the death of Martha E. Robinson before the death of Ivan Jackson this certificate of deposit becomes the property of Ivan Jackson." The certificate was then taken by John Robinson and delivered to Ivan Jackson, who caused his grandson to read it to him and he then handed it to appellee and said: "Take that and put it away it was yours," and it has been in her possession ever since. John Robinson, who was the witness of plaintiff, further testifies: "That was put on the certificate of deposit at my own proposal. The reason I proposed it my wife was a weakly woman and I did not know whether she would live to take care of her father in his old age or not and I did not know but what he would need that money himself before he died and if she didn't live to take care of him I wanted him to have the money to take care of himself. He never made that request to me. There never was any request made whatever on the day I took this money to deposit that it should be in the certificate of deposit." The appellee was not present at these conversations,

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and so far as the record discloses knew nothing of the talk between her husband and the deceased. It further appears from the record that the deceased told J. D. Allen that he was going to give his daughter one thousand dollars or more and he aimed to have it put in the bank in her name so they could not get it from her. Frances Jackson says that Ivan Jackson told her, "I made her a check for twelve hundred dollars." Omer Reece says that Ivan Jackson told him that he had given Martha Robinson twelve hundred dollars and John put it up here in the bank, and in the same conversation said that Martha was run to death and had so much work to do but he intended to pay her well, and named over what he had given her.

It is insisted by counsel for appellant that this was a conditional check and that the gift was made conditional. It will be observed that the check was made payable absolutely to appellee without any conditions, signed by the cashier, and while it is true that written beneath the signature of the cashier was the clause above stated, yet that is not signed by the cashier or included in the certificate, and when this certificate was taken to Ivan Jackson he caused it to be read and delivered it to appellee. He, at that time, said nothing about retaining the money or reserving the right to at any time repossess himself of it. No obligation was taken from her and no request made of her to in any manner return it and he, at that time, did not even sign the memorandum that had been placed at the bottom or ask her to sign it. The statement itself is not a reservation and does not pretend to retain the property in any manner. When we take into consideration the fact that Ivan Jackson at no time made a request that such a clause be even attached to the certificate of deposit, that the placing of such a clause originated with the husband of appellee, that at the time of the delivery by Ivan Jackson to appellee nothing was suggested about retaining or

in any manner resuming possession or control of this money, that he apparently gave no concern about this whole matter, except that he wanted the daughter to have the money, and afterwards told other persons that he had given it to her and that he had placed it so that they could not get it away from her, we are convinced that he had no intention and in fact did not reserve any control of this money but delivered it to her as hers absolutely.

Even if a thought had occurred to him to adopt the suggestion of Robinson, which was made without the knowledge of appellee, and that when deceased came to deliver the certificate to appellee he made no suggestions or requirements of appellee with reference to a return of the money, the reasonable conclusion would be that whatever might have been in his mind before that was waived when he handed the certificate to appellee and said: "Take it, it is yours." It may be that the construction placed upon the writing attached to the certificate by the trial judge is in the nature of a strict construction, but we are of the opinion that under the evidence in this case, and for the purpose of giving effect to the clear intention of the deceased, that he was warranted in adopting such a construction.

Much stress is laid by counsel for appellants upon the case of *Telford v. Patton*, *supra*, and it is insisted that this case is controlled thereby. It is true that the principles with reference to delivery are correctly laid down in that case, but an examination of the case will show that it is entirely different from the one now under consideration. In that case the certificate of deposit had never been delivered to the donee, nor had the donee been advised of its existence, but the donor had simply had a certificate made payable to the donee and kept it in his own possession without in any manner advising any one with reference thereto, and in the decision of that case, the Court at

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page 623 said: "In the absence of any proof of declarations made by Telford to the Bank, and in the absence of any proof as to his intentions in obtaining the certificate, it cannot be said that he was ever wholly divested of control and dominion over the deposit so long as the certificate remained in his possession."

Exceptions have been taken to the court's refusal to give propositions one, four and five offered by the plaintiff. The first proposition is not applicable to facts in this case. There was no condition stated and no provision that it should remain the property of the donor as set forth in the proposition.

In the second and third propositions there is no evidence that any agreement was made between the deceased and defendant, or their authorized agent, and, even if an unsigned statement appeared upon the certificate, as it certainly did, anything contained in such statement could have been waived by the declarations or conduct of the parties, which is entirely ignored by these propositions.

The fourth proposition could well have been held by the court to be the law, but it was given substantially in appellant's sixth proposition.

The criticism made upon plaintiff's third and seventh legal propositions, that the court erred in modifying the same, is without merit, as the statute expressly authorizes the court to modify such propositions under section 61, ch. 110 of the Revised Statutes. (J. & A. ¶ 8598.)

After a very careful examination of this whole record we are of the opinion that the court was warranted in finding the issues for the plaintiff. At all events, committed no error in so finding that would warrant us in reversing the case, and we are of the opinion that the judgment should be affirmed.

Judgment affirmed.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1914.

**David G. Geraghty, Plaintiff in Error, v. National Fire
Proofing Company, Defendant in Error.**

Gen. No. 19,709. (Not to be reported in full.)

**Error to the Superior Court of Cook county; the Hon. THEODORE
BRENTANO, Judge, presiding. Heard in the Branch Appellate Court
at the October term, 1913. Reversed and remanded. Opinion filed
October 6, 1914.**

Statement of the Case.

Action by David G. Geraghty against National Fire Proofing Company to recover for personal injuries sustained by plaintiff. In a former trial plaintiff recovered a joint judgment against the defendant and the William Grace Company and on appeal the judgment was reversed with a finding of fact in favor of the William Grace Company, and directions for a new trial as to the defendant, the National Fire Proofing Company. The second trial resulted in a judgment in favor of the defendant and to reverse the judgment plaintiff prosecutes error. See 157 Ill. App. 308, 309.

Geraghty v. National Fire Proofing Co., 188 Ill. App. 447.

One of the grounds relied on for reversal is the giving of the following instruction:

“If you believe from all the evidence in this case that the plaintiff’s employer, the William Grace Company, was negligent in failing to exercise reasonable care in furnishing the plaintiff a reasonably safe place to work at the time of the accident, and that said negligence was the proximate cause of the injury complained of, then you should find the defendant, National Fire Proofing Company, not guilty.”

RICE, LOWES & O’NEIL, for plaintiff in error.

FRANK M. COX and R. J. FELLINGHAM, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1818*—*conclusiveness of decision on former appeal*. The giving of an instruction calling upon the jury to readjudicate a question which was raised and decided on a former appeal, *held* error.

2. NEGLIGENCE, § 222*—*when instruction erroneous as ignoring question of defendant’s negligence*. In an action for personal injuries where the suit was brought against a company other than plaintiff’s employer, an instruction telling the jury that if they believed from the evidence that plaintiff’s employer was negligent and that said negligence was the proximate cause of the injury they should find the defendant not guilty, *held* erroneous and the giving of the same reversible error, for the reason that it required the jury to ignore the question of defendant’s negligence and the fact that it may have been concurrently negligent even if the proximate cause of the injury was the negligence of plaintiff’s employer.

3. INSTRUCTIONS, § 81*—*when erroneous as singling out facts*. An instruction which improperly singles out one fact in the chain of the evidence for the consideration of the jury is erroneous.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**City of Chicago, Defendant in Error, v. Charles
Murphy, Plaintiff in Error.**

Gen. No. 19,715. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed October 6, 1914.

Statement of the Case.

Prosecution by the City of Chicago against Charles Murphy in which the defendant was convicted on the charge of being connected with the management and operation of premises in the City of Chicago, kept for the purpose of permitting persons to gamble in violation of an ordinance of said City. To reverse the judgment, defendant prosecutes error.

EDWARD H. MORRIS, for plaintiff in error.

WILLIAM H. SEXTON and JAMES S. McINERNEY, for defendant in error; ALBERT J. W. APPELL, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 864*—*when proof of venue insufficient to sustain conviction for violation of ordinance.* A conviction for a violation of a gambling ordinance cannot be sustained where the only proof of the venue was that the gambling took place at "3036 South State street," and there was nothing in the record to show that the street was located in the city alleged.

2. EVIDENCE, § 14*—*judicial notice of location of streets.* Courts of this State will not take judicial notice that certain streets mentioned in the record are located in any particular city.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topics and section number.

Carey v. Chicago Railways Co., 188 Ill. App. 450.

Margaret Carey, Plaintiff in Error, v. Chicago Railways Company, Defendant in Error.

Gen. No. 19,729. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed October 6, 1914.

Statement of the Case.

Action by Margaret Carey against Chicago Railways Company to recover for an assault by defendant's conductor in ejecting plaintiff from one of its cars. To reverse a judgment for defendant, plaintiff prosecutes a writ of error.

SMIETANKA, JOHNSON, MOLTHROP & POLKEY, for plaintiff in error; CHARLES P. MOLTHROP, of counsel.

ROBERT J. SLATER and ALFRED B. DAVIS, for defendant in error; JOHN R. GUILLIAMS and FRANK L. KRIETE, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. INSTRUCTIONS, § 154*—*when modification by substituting word "may" for "will" misleading.* Where an instruction as offered told the jury "that it is the duty of plaintiff to prove her case by a preponderance or greater weight of the evidence, and if the jury believe that the evidence bearing upon the plaintiff's case, as laid in her declaration or any count thereof, preponderates in her favor, they will find the defendant guilty," was modified by the court in substituting for the word "will" the word "may" in the final clause, held the modification rendered the instruction misleading as conveying the idea that the direction to find the defendant guilty was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Noble v. Watson, 188 Ill. App. 451.

discretionary, and that the misleading character of the instruction was sufficient to require a reversal.

2. INSTRUCTIONS, § 52*—*use of mandatory words*. Where an instruction is to direct the jury to find for the party that proves his case by a preponderance of the evidence, the direction should be mandatory by the use of the word "shall" or "should," though the use of the word "will" will not be considered improperly employed.

3. CARRIERS, § 525*—*when testimony improperly stricken out as hearsay evidence*. In an action against a street railway company to recover for a malicious assault by defendant's conductor in ejecting plaintiff from one of its cars, plaintiff swore that she gave the conductor a transfer and she was corroborated as to such fact by another passenger who also swore that she told the conductor before ejecting plaintiff that she had paid her fare, and plaintiff also testified as to what said passenger told the conductor but the court struck out the testimony as hearsay evidence, *held* that the court erred in striking out the testimony for the reason it tended to show what information the conductor had before ejecting plaintiff, and was material and direct evidence bearing on the question of malice and the character of his subsequent conduct.

William K. Noble, trading as Wayne Hoop Company,
Appellee, v. Charles A. Watson et al., trading as
C. A. Watson & Company, Appellants.

Gen. No. 19,749. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY OLSON, Judge presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed October 6, 1914.

Statement of the Case.

Action by William K. Noble, trading as Wayne Hoop Company against Charles A. Watson, Reginald A. Watson and Harold B. Watson, copartners, trading as C.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Noble v. Watson, 188 Ill. App. 451.

A. Watson and Company to recover the purchase price of a carload of hoops shipped by plaintiff from Fort Wayne, Indiana, to the defendants at Savannah, Missouri. Defendants did not deny liability for the hoops, but filed a set-off for damages in delaying delivery. By agreement the claim of plaintiff was adjusted and the case heard on defendants' claim of set-off as if on an independent action therefor. At the close of the case the court, on motion therefor, directed a verdict for plaintiff. To reverse the judgment entered on the verdict, defendant appeals.

The contention of appellants was that there was evidence tending to show a complete oral agreement between the parties and damages for a breach thereof, and appellee's contention was that the oral agreement was merged in a subsequent written agreement, as to which there was no proof of damages.

The record shows that Reginald A. Watson, one of the appellants, testified that the dealings began by conversations over the telephone with one Milliken, appellee's agent, about August 25, 1910; that in a conversation on August 31st the latter expressly promised and agreed to have a car containing 60,000 hoops rolling by September 2nd and delivered at Savannah, Mo., by September 5, 1910, without fail, at the price of \$10.25 per thousand, and that thereupon Watson said: "You can take the order and I will wire you tomorrow so that you will have something to show for this order." Accordingly, the next morning he sent appellee the following telegram: "Ship Savannah, Mo., car to be rolling night of September second sixty thousand number one elm hoops six feet.

C. A. Watson & Co."

and wrote appellee a letter saying:

"This confirms our wire this date instructing you to load car 60,000 No. 1 elm hoops 6 ft., to be billed to ourselves Savannah, Mo. Car to be loaded and rolling Friday night, Sept. 2, 1910. Price to be as per your quotation \$10.25 per M. F. O. B. above destina-

tion, terms to be 30 days net. We may want part of this car at Amazonia with a stop off at Savannah to partly unload. Then if we wish all car to Savannah can unload same there. Kindly forward B. L. to us promptly so that we can trace to destination and you also trace as we are waiting for stock and if same is satisfactory you will hear from us with further business. In haste,

C. A. W. & Co., R. A. Watson."

A letter of same date, answering said telegram and signed "Wayne Hoop Co.," was as follows:

"In line with your telegram of even date we enter your order for carload of 60,000 -6-0' hoops to be shipped Savannah, Mo., which we will let go forward either Saturday or Monday. If we can get them out tomorrow, will certainly do so, but hardly think our mill will be able to get them out.

After the car leaves our mill, we will have it followed with a wire tracer, and have it rushed through to you without further delay."

On September 2nd, appellee replied to appellants' letter as follows:

"We have your favor confirming your telegram of even date. We wrote you yesterday, acknowledging receipt of your order, which we wired you we could get on the way either Saturday or Monday of next week. We note you want us to bill this shipment to you at Amazonia, Mo., with a stop-off at Savannah, and have taken this matter up with our mill to do this. It is a little doubtful whether they will allow us to do this, as the western railroads as a rule do not allow stop offs.

Our traffic manager has not rate to Amazonia, Mo., and we presume it takes St. Joseph rate of freight. If not, we will expect you to stand all over this.

Yours truly,

Wayne Hoop Co."

Shewbridge v. Chicago City Railway Co., 188 Ill. App. 454.

After receiving the two letters from appellee, appellants wired on September 5th:

“Just arrived Chicago. Note letter second. Is car rolling? Send number and routing,” and on September 8th: “Why don’t you give us car number routing car hoops. Must have car at once to prevent serious damage.”

HOYNE, O’CONNOR & IRWIN, for appellants; CARL J. APPELL, of counsel.

MUSGRAVE, OPPENHEIM & LEE, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

SALES, § 373*—*when evidence of oral contract as to time of delivery sufficient to go to jury.* In an action for the purchase price of a carload of hoops, where the case was tried on the buyers’ claim of set-off for delay in delivery of the shipment, *held* that the evidence tended to show a complete oral contract made by telephone with plaintiff’s manager to deliver the car to the defendants by a certain date, to show that defendants’ subsequent telegram and letter were intended to confirm the oral agreement rather than to constitute an abrogation of it, and to furnish a basis for the computation of damages; and *held* that it was therefore a question for the jury whether there was such an oral agreement, and that the court erred in directing a verdict for the plaintiff.

**J. A. Shewbridge, alias J. A. Strewbridge, Appellee,
v. Chicago City Railway Company, Appellant.**

Gen. No. 19,801. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 6, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shewbridge v. Chicago City Railway Co., 188 Ill. App. 454.

Statement of the Case.

Action by J. A. Shewbridge, *alias* J. A. Strewbridge against Chicago City Railway Company to recover damages for personal injuries received by plaintiff while a passenger on one of defendant's cars. The injuries resulted from a collision between the car and a team and wagon at a street intersection. The action is grounded on the claim of negligence by the motor-man in approaching the crossing, (1) in propelling the car at too great speed; (2) in failing to keep a proper lookout; (3) in not having the car under proper control; (4) in failing to sound the gong. From a judgment in favor of plaintiff for three thousand dollars, defendant appeals.

BUSBY, WEBER, MILLER & ROBINSON, JAMES G. CONDON and ARTHUR J. DONOVAN, for appellant; LEONARD A. BUSBY, of counsel.

RICHARD J. FINN, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. DAMAGES, § 134*—*when recovery for injury to skull not excessive.* A verdict for three thousand dollars for personal injuries held not excessive where plaintiff received a fracture of the skull, necessitating the removal of a portion thereof which left a depression about one-third of an inch deep and two inches long, leaving the brain apparently covered by connective tissues and cartilage only, it appearing that the condition is permanent and that he suffered from headaches, dizziness and pains in the head continuously.

2. APPEAL AND ERROR, § 2143*—*when improper proceedings in trial cannot be complained of.* A party is in no position to urge as

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shewbridge v. Chicago City Railway Co., 188 Ill. App. 454.

error improper proceedings in trial court which tended to convert the trial into a mere game, where he made no complaint below, but on the contrary his counsel sought to use it for his own advantage.

3. INSTRUCTIONS, § 15*—*when properly refused for permitting jury to determine material issues.* A requested instruction which leaves it to the jury to determine for itself what are the material points in the case, from the declaration and without any other instruction to guide them, *held* properly refused.

4. CARRIERS, § 484*—*when instruction on degree of care to passenger not misleading.* An instruction given for plaintiff which told the jury: "It is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do under the circumstances, and in view of the character of the mode of conveyance adopted, and the practical operation of the road, reasonably to guard against accidents and consequential injuries, and if they neglect so to do, they are to be held strictly responsible for all consequences which directly flow from such neglect (provided such neglect and consequences is alleged in the declaration and established by the proofs); that while the carrier is not an insurer of the absolute safety of the passenger, it does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passengers and is responsible for the slightest neglect resulting in injury to the passenger (provided such neglect and injury is alleged in the declaration and established by the proof) if the passenger is, before and at the time of the injury, exercising ordinary care for his own safety," *held* not misleading for the reason that the last part of it (following the semicolon) omitted to limit the decree of care to such as is consistent with the practical operation of the car line, in view of the fact another instruction given embodied the limitation, and that reference to the same limitation was again made in the first part of the instruction complained of.

5. INSTRUCTIONS, § 81*—*when not objectionable as singling out one of a series of facts.* In an action against a street railway company to recover for personal injuries sustained by a passenger in a collision, a requested instruction as to the rate of speed a street car may run without being charged with negligence, *held* not subject to objection that it violates the rule against singling out and directing the jury's attention to one of a series of facts,—that relating to speed, where it distinctly directs consideration of the evidence on that point with the other circumstances in evidence.

6. CARRIERS, § 479*—*when refusal of requested instruction not prejudicial.* The refusal of a requested instruction telling the jury that: "The law does not regulate the precise rate of speed at which

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Advance Amusement Co. v. Franke, 188 Ill. App. 457.

a street car must be run under any given circumstances, nor does it require that street cars be run at such a low rate of speed that would prevent the practical operation of the railroad's business as a public carrier of passengers. There is no law limiting the rate of speed to any given number of miles. The law only requires that those operating the car exercise towards passengers the highest degrees of practicable care, as defined by these instructions, and if you believe from the evidence, and under the instructions, that the rate of speed at which the car was being run at the time and place of the accident was, under the circumstances in evidence in this case, not inconsistent with the exercise of the highest degree of practicable care as defined herein, on the part of those in charge of the car, then no negligence can be chargeable to the defendant in the operation of the car on the ground of the speed at which it was running," *held* not prejudicial error where it was not contended that the defendant was limited to any particular speed and all that was material in the instruction was included in another instruction given.

7. DAMAGES, § 211*—*when evidence justifies instruction to allow for future suffering and loss of health.* The giving of an instruction directing the jury to consider evidence of "future suffering and loss of health" in determining the amount of damages, *held* not objectionable on the ground there was not evidence to justify consideration of such matters, where there was proof that plaintiff was suffering from a recurrence of pains in his head and dizziness up to the time of the trial.

Advance Amusement Company, Appellee, v. Frederick H. Franke, Appellant.

Gen. No. 19,826. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 6, 1914. Rehearing denied October 16, 1914.

Statement of the Case.

Action by Advance Amusement Company against Frederick H. Franke to recover the sum of twenty-five

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Advance Amusement Co. v. Franke, 188 Ill. App. 457.

hundred dollars deposited by plaintiff with defendant pursuant to the terms of a lease. Plaintiff on March 11, 1912, leased certain premises of defendant for a term ending February 28, 1917, at a rental of three hundred and fifty dollars per month. By reason of default and failure to pay rent for December and a portion of the rent for November, 1912, the lessor, after giving the statutory five days' notice, brought suit for possession of the premises, obtaining judgment therefor December 17, 1912. In the present suit plaintiff recovered a judgment for the sum of the deposit, less the amount of rent that had accrued and remained unpaid to the date of the termination of the lease as aforesaid. To reverse the judgment, defendant appeals.

SONNENSCHN, BERKSON & FISHELL, for appellant.

T. F. MONAHAN, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. DAMAGES, § 88*—*when sum named in lease as liquidated damages construed as penalty.* A provision in a lease that in the event the lease shall be terminated by reason of a breach of the second party of any of its terms and conditions by him to be performed, "then and in such event the party of the first part may at his option retain as for and in full of liquidated damages" a certain stipulated sum, construed as providing for a penalty instead of liquidated damages in view of the use of the words "at his option."

2. DAMAGES, § 88*—*when stipulated sum will be construed not liquidated damages.* Where there is language in the contract indicating that the damages that may arise from its breach were not irrevocably fixed and settled by the parties, the inference would be against the conclusion that a stipulated sum was intended as liquidated damages, even though the parties so denominated it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Agnes E. Nadler, Appellee, v. Illinois Commercial Men's Association, Appellant.

Gen. No. 19,833.

1. INSURANCE, § 717*—*words "passenger train" in by-law construed.* A train run on schedule time carrying passengers as well as freight, *held* to be a "passenger train" within the meaning of a by-law of a mutual benefit association which provided for an indemnity to be paid in case of the death of a member while riding as a passenger on a passenger train.

2. INSURANCE, § 120*—*rule in construing policies.* Where expressions in insurance policies are susceptible of two interpretations and of doubtful meaning, the one most favorable to the insured will be adopted.

3. EVIDENCE, § 403*—*when expert testimony incompetent to explain meaning of words.* The expression "passenger train" in a by-law of a mutual benefit association providing for the payment of an indemnity in case of the death of a member while riding as a passenger on a passenger train, *held* not ambiguous so that testimony of railroad officials would be competent to explain it.

Appeal from the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 6, 1914.

JAMES MAYER and RYAN & CONDON, for appellant;
IRVIN I. LIVINGSTON, of counsel.

M. MARSO, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

One Frank Nadler, to whom appellant issued an accident insurance policy, met his death as the result of the derailment of a railroad train, propelled by steam, consisting of an engine, tender, six loaded freight cars, a caboose and a passenger coach. At the time of the accident he was riding as a passenger in said coach. The train was under charge and control

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nadler v. Illinois Commercial Men's Ass'n, 188 Ill. App. 459.

of a conductor and train crew, and ran on schedule time carrying passengers and baggage as well as freight.

The sole question here involved is whether such train was a "passenger train" in the sense those words are used in a proviso of one of appellant's by-laws, which, though adopted subsequent to the issuance of the policy, became by its provisions a part thereof, and reads:

"Provided, however, that the indemnity to be paid under the provisions of this section, in case the death of the member shall have resulted from an accident, which occurred to said member whilst riding as a passenger on a passenger train, propelled by steam and inside a coach or passenger car thereof, shall be \$10,000."

The case was heard by the court without a jury, and the several assignments of error are embraced in the claim that the court erred in refusing to hold as law and to find as a fact that such train was not a "passenger train" within the meaning of the policy.

Testimony was given in behalf of appellant by railroad officials, presumably called as experts, to the effect that in railroad circles trains are designated and known as passenger, freight and mixed; that, besides the engine, a passenger train consists of a baggage car and passenger coaches; a freight train of freight cars and a caboose; and a mixed train of freight cars and a passenger coach or combination car. While no evidence to the contrary was offered, the court properly, in our opinion, disregarded such testimony. It was not needed for construction of the contract and was therefore incompetent. Its interpretation involved no question of science, skill or trade justifying resort to expert testimony. The right to indemnity depended entirely upon whether the words "passenger train" applied to the train in question, existence of the other conditions of liability not being questioned. Appellant seeks to impress upon

them a technical meaning, adapted to distinctions made for railroad and possibly some commercial purposes. But in ordinary acceptation and use a "passenger train" is one run and "advertised to take passengers generally—people travelling from place to place—upon terms and in the manner ordinarily applicable to such passengers" (2d Bouvier's Law Dict., 611, 612), and it is no less a passenger train, when so run and advertised, simply because it also carries freight. The main object of the policy was indemnity against accidental injury or death while the insured was being carried as a passenger on a train scheduled and used for such service. Had appellant intended by the proviso in question to limit its liability to trains carrying passengers and baggage only, it would have been an easy matter to have framed the by-law "in such a way," as said in *Illinois Cent. R. Co. v. People*, 143 Ill. 434, involving a similar question of construction, "that no doubt could have existed in regard to the intention." Without other restrictive or qualifying words the expression employed in the by-law could not without violence to its ordinary meaning,—keeping in view, as we must, the purpose of the policy,—be limited by the technical distinctions observed in railroad parlance.

Even if the expression be deemed susceptible of two interpretations and of doubtful meaning, then in accordance with a recognized principle in construing insurance policies, the one most favorable to the insured will be adopted. *Healey v. Mutual Acc. Ass'n*, 133 Ill. 556; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39; *Terwilliger v. National Masonic Acc. Ass'n*, 197 Ill. 9; *Grand Legion of Illinois, Select Knights of America v. Beaty*, 224 Ill. 346. In fact it has been held that in such a case, "the court should construe the provisions of the contract strictly as respects the company and liberally as regards the insured, because the language employed is that of the insurance company."

Sachs v. Giesenschlag, 188 Ill. App. 462.

Burkheiser v. Mutual Acc. Ass'n, 10 C. C. A. 94, 61 Fed. 816. Several cases may be referred to, without discussing them, where the same rigid construction of the words "passenger train," as employed in statutes and contracts, has been unsuccessfully evoked. *Ohio & M. Ry. Co. v. People*, 29 Ill. App. 561; *Illinois Cent. R. Co. v. People*, *supra*; *Cleveland, C., C. & St. L. Ry. Co. v. People*, 175 Ill. 359; *Gray v. Chicago, M. & St. P. Ry. Co.*, 189 Ill. 400; *Chicago Great Western Ry. Co. v. St. Paul Union Depot Co.*, 68 Minn. 220; *Schwartz v. Missouri, K. & T. Ry. Co.*, 83 Kan. 30.

We agree with appellant that the expression is not ambiguous, and therefore the testimony heard to explain it was incompetent. Keeping in view the purpose of the policy and the ordinary use and meaning of the expression, we entertain no doubt that, as used in the by-law, it contemplated any train, like the one in question, regularly run on schedule time for the accommodation and carriage of passengers, whatever else it might carry.

We think the judgment fixing appellant's liability accordingly should be affirmed.

Affirmed.

Marcus Sachs, Appellee, v. Charles F. Giesenschlag et al., on appeal of Charles F. Giesenschlag, Appellant.

Gen. No. 19,846. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. **Affirmed.** Opinion filed October 6, 1914.

Statement of the Case.

Action by Marcus Sachs against Charles F. Giesenschlag and others on an appeal bond. In a suit for an accounting between Marcus Sachs and Simon Sachs, copartners, a money decree in favor of the former was entered, and in default of payment thereof a receiver was appointed to hold the property until sold and disposed of under the orders of the court. An appeal taken by Simon Sachs from the decree having been dismissed, this suit was brought upon the appeal bond. To the cause of action it was pleaded below that the receiver took possession of property belonging to Simon Sachs sufficient in value to pay the decree, costs and interest, and that said decree gave plaintiff a first lien thereon. From a judgment entered against the defendant Charles F. Giesenschlag, one of the sureties on the bond, he appeals.

It is contended on appeal that the possession of the receiver under the circumstances was a satisfaction *sub modo* the same as a levy by virtue of an execution on property sufficient to satisfy the judgment upon which it is issued.

CHARLES DANIELS and SUMNER C. PALMER, for appellant.

SILBER, ISAACS, SILBER & WOLEY, for appellee; CLARENCE J. SILBER, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1855*—*undertaking of sureties on appeal bond.* Sureties on an appeal bond are bound by the terms of the bonds and must pay upon the occurrence of the contingencies upon which they agreed to pay.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Postal Telegraph-Cable Co. v. Staehle, 188 Ill. App. 464.

2. APPEAL AND ERROR, § 1864*—*what not a defense by surety on appeal bond.* A surety on an appeal bond, where the appeal was dismissed, cannot in a suit on the bond interpose the defense that the decree appealed from was satisfied by reason of the fact that a receiver appointed by the court below took possession of sufficient property of the obligor to pay the decree, costs and interest.

3. SUBROGATION, § 30*—*right of surety on appeal bond.* A surety on an appeal bond who is required to pay the amount of the judgment, costs, etc., is entitled to be subrogated to the obligor's right *pro tanto* to funds in the hands of a receiver, who was appointed by the trial court to take possession of the obligor's property.

**Postal Telegraph-Cable Company of Illinois, Appellee,
v. Robert Staehle et al., Appellants.**

Gen. No. 20,604. (Not to be reported in full.)

Interlocutory appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court. Reversed. Opinion filed October 6, 1914.

Statement of the Case.

Bill in equity by Postal Telegraph-Cable Company of Illinois, a corporation, against Robert Staehle, doing business as Selden Investment Company, and others. In its material parts the bill avers that complainant employs a large force of skilled persons to whom defendant, Staehle has made loans at exorbitant and usurious rates of interest on their individual notes secured by assignments of their wages earned and to be earned for a period of ten years, each with an annexed power of attorney to make certain waivers and confess judgment for the amount loaned with usury, attorneys' fees, etc.; that complainant has endeavored to comply with such assignments with the result that employees quit its service and its business was thereby injured; that it made an agreement with

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

defendant Staehle for partial payments each month on certain of said loans but that Staehle disregarded the same, demanding payments in full and resorting to the courts for the enforcement of said assignments and his claims; that several suits based on said assignments are pending against complainant and other suits are threatened, and that the other two defendants, his attorneys, are conspiring with him to bring such suits.

Connected with these averments are allegations in general terms, unsupported by averments of fact, that the assignments were procured by fraud, misrepresentation and duress, and that defendant Staehle has "extorted" and is attempting to extort illegal sums of money and the wages of said employees.

Pursuant to the prayer of the bill the court entered an interlocutory order restraining defendants from prosecuting pending suits and bringing further suits at law on assignments of wages made by complainant's employees, and from extorting or attempting to extort money from them. This appeal is from an interlocutory order granting the injunction and denying defendants' motion to dissolve the same.

CHARLES R. NAPIER and CHARLES S. McILVAINE, for appellants.

JACOB E. DITTUS, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. INJUNCTION, § 187*—*when bill to enjoin prosecution of suits on assignments of wages insufficient.* A bill filed by a company against an assignee of its employees' wages to restrain said assignee and his attorneys from prosecuting suits at law on such assignments on the ground that such assignments were procured by fraud

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Postal Telegraph-Cable Co. v. Staehle, 188 Ill. App. 464.

and that to enforce the assignments would result in complainant's employees quitting its service and thereby injuring its business, *held* to contain no averments entitling complainant to equitable relief, there being no averments of fact to show that assignments were procured by fraud and the bill setting forth nothing illegal in the transaction except usury.

2. SUBROGATION, § 5*—*when employer paying wages after notice of assignment not entitled to.* Where an employer after notice of assignment of wages pays the employees their wages, he is not entitled to subrogation against the assignee where the assignors are legally liable for the amount of their loans and bound by their assignments.

3. DISCOVERY, § 5*—*when claim of right to, does not furnish ground for equitable relief.* Equity will not entertain a bill upon complainant's claim of a right to a discovery and an accounting, where its right thereto is predicated upon the claim that it has no means of knowing the number and amount of assignments of its employees' wages and that it has paid its employees' wages so assigned in order to retain their services and to prevent defendant using such assignments "to extort money to which he is not entitled," it appearing complainant is not liable on any assignments of which it received no notice and the bill not alleging its inability to acquire such information from its employees or their assignee.

4. EQUITY, § 59*—*multiplicity of suits.* Equity will not take jurisdiction on the ground of multiplicity of suits, where the only suits that can be brought against complainant are upon assignments of its employees' wages and no one of such suits would settle any controversy of fact or law in the others, it also appearing that the complainant seeks to adjust in one suit by an accounting the several rights of action which it has voluntarily invited against itself by disregarding notices of what it admits were legal assignments, and as to which anything in the bill constituting a defense would be available at law.

5. INJUNCTION, § 160*—*sufficiency of verification of bill for preliminary injunction.* A preliminary injunction will not be granted where the essential allegations are verified on information and belief.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Continental & Commercial Trust & Savings Bank,
Trustee, Appellant, v. Breen & Kennedy et al.,
Appellees.**

Gen. No. 19,757.

1. **BANKRUPTCY, § 23*—*proof of preferential payment.*** To charge a creditor of a bankrupt with a preferential payment the trustee is required to prove not only that the bankrupt made a payment which had the effect of a preference, but also that the creditor had reasonable cause to believe that a preference was intended; it is not sufficient to prove that the creditor had knowledge of facts and circumstances sufficient to put him on inquiry to ascertain whether the debtor was insolvent and that the payment was intended as a preference.

2. **BANKRUPTCY, § 23*—*persons chargeable with preferential payments.*** An indorser or guarantor of a note of a bankrupt is a creditor within the meaning of section 60 b of the Bankruptcy Act so as to charge him with a preferential payment made to the holder of the note, and both the owner of the note and the indorser or guarantor may be charged for the receipt of a preferential payment to the holder, but only the amount by which the assets of the estate have thereby been depleted must be returned.

3. **BANKRUPTCY, § 23*—*when evidence insufficient to charge defendants with preferential payments.*** In an action against two defendants to recover preferential payments made to them by a bankrupt within four months from the time the bankruptcy petition was filed, evidence *held* insufficient to prove that either defendant had reasonable cause to believe that a preference was intended.

4. **ACTION, § 32*—*when action is in contract.*** An action by a trustee of the estate of a bankrupt against two defendants to recover a certain sum of money alleged to have been paid as a preference, *held* to be an action in contract, requiring plaintiff to prove his cause of action against both defendants.

Appeal from the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 6, 1914.

Statement by the Court. On April 22, 1912, plaintiff, as trustee of the estate of Minor T. Jones, bankrupt, filed a *praecipe* in the office of the clerk of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Con. & Com. T. & S. Bank v. Breen & Kennedy, 188 Ill. App. 467.

Municipal Court of Chicago, in an action of the first class, directing the issuance of a summons against Breen & Kennedy, a corporation, and Andrew J. Graham, doing business as Graham & Sons, as defendants, "in a plea of trespass on the case on promises." The summons was issued and served upon both defendants, and they entered their appearance.

Plaintiff's second amended statement of claim alleged, in substance, that plaintiff's claim was for the recovery, as trustee of the estate of Minor T. Jones, bankrupt, of "certain preferential payments" made by said Jones; that on March 23, 1909, an involuntary petition in bankruptcy was filed against said Jones, and on April 24, 1909, he was duly adjudicated a bankrupt; that on January 15, 1909, within less than four months prior to the filing of the petition, Jones paid out of his assets a promissory note, previously given by him, for \$1,000 with interest thereon, which note was due on or about January 1, 1909; that on February 15, 1909, he also paid out of his assets four promissory notes, previously given by him, each for \$1,000 and due respectively on or about February 1, March 1, April 1, and May 1, 1909, only the first of which notes being due at the time of said payment; that to pay said five notes and accrued interest said Jones paid out of his estate the total sum of \$5,457.50; that the same "were paid to Graham & Sons, bankers, *either* for their own personal benefit, *or* for the use of Breen & Kennedy, a corporation, one of the defendants, *or* for the use and benefit of both Graham & Sons and Breen & Kennedy;" that on January 15, 1909, and for some time prior thereto, and on February 15, 1909, "Graham & Sons and Breen & Kennedy, *or either or both of them*, were well informed or had knowledge of facts sufficient to charge them with notice," that the said Jones was insolvent, and that the payment of said \$5,457.50 by said Jones "would necessarily operate as a preference by the bankrupt in favor of said Graham & Sons and said Breen & Kennedy, *or which*

ever of them were real beneficial owners of said notes;” that on May 11, 1911, plaintiff was duly appointed trustee of said bankrupt’s estate and has been allowed by the United States Court to bring this suit in behalf of said estate; and that “plaintiff desires to recover of said Graham & Sons *or* said Breen & Kennedy, *or either or both of them*, or whichever one of them shall have received the benefit thereof, the said sum of \$5,457.50, with interest thereon at the rate of five per cent. per annum from February 15, 1909, * * * being preferential payments to said defendants, *or either or both of them*, within the purview of the acts of bankruptcy of 1898 and the amendments thereto.” To this second amended statement was attached an affidavit of an agent of plaintiff to the effect that the suit was “for the recovery of money only,” that the nature of plaintiff’s demand was “for money paid to said defendants as a preference,” and that there was due to plaintiff from the defendants, after allowing all just credits, etc., the sum of \$5,457.50 with interest from February 15, 1909.

The defendants filed separate affidavits of merits. The affidavit on behalf of the defendant Andrew J. Graham was made by an agent, Frank J. Graham, and it was therein admitted that said Jones paid certain of his promissory notes within four months prior to March 23, 1909, to said Andrew J. Graham, but it was stated that “all said payments were made to his (Graham’s) own use alone and not to the use of Breen & Kennedy,” and that this defendant (Graham) “had no knowledge of any facts charging this defendant with notice that said Jones was insolvent or that the payment of said notes would operate as a preference by the alleged bankrupt in favor of this defendant.” The affidavit of merits on behalf of Breen & Kennedy was made by the secretary of that corporation, and it was therein denied that said bankrupt paid any sums of money either directly to said defendant or to Andrew J. Graham for the use of said defendant within

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said four months prior to March 23, 1909, and denied that said defendant had any knowledge, or notice of any facts charging it with knowledge, that said Jones, when he paid said sums to said Graham, was insolvent or that said payments would operate as a preference.

The case was tried before a jury. It was stipulated that on March 23, 1909, an involuntary petition in bankruptcy was filed in the United States District Court, for the Northern District of Illinois, against Minor T. Jones; that on that date his assets amounted to \$4,305, and that his liabilities to 148 unsecured creditors amounted to \$136,915; that on April 24, 1909, he was adjudicated a bankrupt and that plaintiff was appointed trustee. The plaintiff called the bankrupt, Jones, as a witness, who testified that on January 15, 1909, he paid to Graham & Sons, out of his assets, a note for \$1,000 with the accrued interest thereon, and that on February 15, 1909, he also paid to Graham & Sons, out of his assets, four notes for \$1,000 each, with accrued interest thereon, and that the total sum paid to take up said five notes was \$5,437.50. It was shown that at the time of the making of said payment Jones was in fact insolvent. Plaintiff, to sustain the allegations of its second amended statement of claim that at the time of said payments the defendant Graham or the defendant Breen & Kennedy, or both, had knowledge that Jones was insolvent and that said payments would necessarily operate as a preference in favor of both defendants, or whichever of them was the beneficial owner of said notes, examined Jones at considerable length, and also cross-examined under section 33 of the Municipal Court Act (J. & A. ¶ 3345) the defendant Andrew J. Graham and A. B. Gillespie, secretary of Breen & Kennedy, and also called as witnesses two court stenographers who had reported the prior examinations had in the bankruptcy court of the defendant Graham and of Martin J. Breen, former president of Breen & Kennedy, who was dead at the time of the trial. The plaintiff also introduced certain

documentary evidence. To avoid the necessity of plaintiff proving what percentage would be paid upon the claims of the general creditors, a stipulation was entered into to the effect that said payments on said notes would enable the person receiving them, or to be benefited thereby, to obtain a greater percentage of his debt than other creditors of the same class. At the close of plaintiff's evidence each defendant presented a written motion that the court instruct the jury to find the issues in favor of said defendant, which motions the court granted and instructed the jury accordingly. The jury returned a verdict finding the issues against plaintiff, and subsequently the court, after overruling a motion for a new trial, entered judgment against plaintiff for costs, which judgment plaintiff by this appeal seeks to reverse.

From the evidence introduced by plaintiff the following facts, in substance, appear: Minor T. Jones had been conducting a large restaurant and bar on premises, known as 175 Jackson boulevard (old number) in the city of Chicago, owned by David B. Mayer, and of which premises Jones had a lease, dated June 1, 1906, and running to April 30, 1916. The lease provided that in case the premises should be rendered untenable by fire the lessor might terminate the lease, or repair the premises within thirty days, and failing to do so, or upon the destruction of the premises by fire, the term created should cease and determine. On the night of January 1, 1909, the restaurant was practically destroyed by fire, and Jones within a day or two moved to a nearby location, where until the filing of the bankruptcy petition he conducted a smaller restaurant, bar and cigar store. He testified that his landlord, Mayer, promised to repair the burned premises; that he (Jones) considered his leasehold worth about \$50,000 and the good-will of his business worth about \$25,000; that just prior to the fire the value of his stock of merchandise was about \$7,000 and the

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equipment had cost him about \$20,000; that he collected about \$22,000 insurance on stock and equipment, about \$16,000 of which was payable to and was paid to a Mr. Lenori of New York; that he expected to resume business at his old location when the premises were repaired, but that shortly before the filing of the petition in bankruptcy his landlord advised him that he would not repair the premises and had decided to cancel the lease. The defendant Breen & Kennedy was in the wholesale liquor business, and from time to time had sold merchandise to Jones on credit. About October 1, 1907 (about fifteen months before the fire), Jones owed Breen & Kennedy approximately \$22,000, which the latter was urging Jones to pay. The defendant Graham was then in the habit of taking his noonday lunch in Jones' restaurant, and Jones told Graham that he wanted to borrow \$20,000, in order to pay that sum to Breen & Kennedy, and after several interviews were had Graham agreed to loan Jones the money. Jones executed a series of twenty notes each for \$1,000, dated October 1, 1907, payable to the order of himself and by him indorsed, and due at monthly intervals on the fifteenth day of the month, the last of which notes matured on June 15, 1909. Jones testified that he took the notes over to the bank of Graham & Sons and gave them to a teller, with instructions to credit the proceeds to Breen & Kennedy; that he did not deliver to anyone any collateral or security on said notes, and that shortly after the delivery of the notes he received a statement from Breen & Kennedy crediting him with the sum of \$20,000 and showing a balance due of about \$2,000. No indorsement or guaranty of said notes was placed thereon by Breen & Kennedy. All of said notes which matured before the fire were paid by Jones as they became due. After the fire Jones paid the note maturing January 15, 1909, together with accrued interest, at Graham & Sons' bank, partly out of the income

received from the operation of said smaller restaurant and bar, and partly out of certain insurance money received. Some time in February Jones paid the note maturing February 15, 1909, and also paid three other notes, together with accrued interest, maturing in March, April and May, out of the insurance money received. Jones testified that he made these payments to the teller at the bank; that he did not have money enough to take up the last remaining note, maturing June 15, 1909; that his object in making said January and February payments was to keep his credit good with Graham, as at that time he was expecting that the burned premises would be repaired and that he would there re-establish himself; that his object in paying the notes which had not yet matured was to stop the interest; and that after the fire he did not see or talk with Graham about his affairs.

The defendant Andrew J. Graham testified that at the time he took the notes from Jones in October, 1907, he investigated the financial condition of Jones, the same as he would any other customer; that he ascertained that Jones owed about \$50,000 and that his assets were about \$150,000; that he did not get from Jones a detailed statement of his liabilities; that he knew Jones owed Breen & Kennedy and that the money loaned was going to its credit; and that there was no legal liability on the part of Breen & Kennedy on any of said series of notes. The witness produced a loose-leaf taken from a bills receivable ledger of his bank, showing the Jones account,—the debiting of the last fifteen of said notes, and the credit payments of fourteen of said notes. At the top of said leaf were the words "Account No. 2" and "Discounted for Minor T. Jones (B & K)." The witness stated that the words "Account No. 2" might refer to the fact that five of the twenty notes were sold to another bank and that account No. 1 might relate to those five notes. The witness also stated that he knew of no other significance to the memorandum "B & K" than that

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Breen & Kennedy got credit for the notes. The witness refused to bring into the court the ledger from which said leaf was taken and certain other books of the bank, but it was agreed that counsel for plaintiff might examine said books at the bank, and the witness testified on the following morning that counsel had made such examination at the bank. The witness further testified that his bank had no book of record of guarantors, and that when notes were received from customers the notes themselves would show whether or not there was any secondary or guarantor's liability.

Frank M. Harker, a court reporter, testified that on November 5, 1909, Martin J. Breen, president of Breen & Kennedy, was examined in the bankruptcy proceedings and that he (Harker) took down in shorthand the questions put to Breen and the answers given thereto. The witness read from his notes, showing that Breen then testified in part that in October, 1907, Breen & Kennedy got credit at Graham & Sons' bank for \$20,000 on said Jones' notes; that said notes were not indorsed by Breen & Kennedy, nor did Breen & Kennedy guaranty the payment of said notes in any way; that he (Breen) never told Graham that he would see that said notes would be paid, or ever gave Graham a written guaranty or letter to that effect, and that neither he nor any officer of Breen & Kennedy ever entered into any agreement, written or oral, to hold Graham harmless on said notes; that Breen & Kennedy after October, 1907, continued to extend credit to Jones, and at the time of the filing of the bankruptcy petition Jones owed it on open account the sum of \$22,794; that after the fire he had several talks with Jones about the latter continuing the business and getting the premises repaired; that he never asked Jones for security for or payment of said open account, but let him go ahead and adjust his insurance, etc.; that he (Breen) left Chicago on January 23, 1909, and did not return until March 5, 1909; and that the immediate

cause of the filing of the bankruptcy petition by Breen & Kennedy and others was the change in Mayer's attitude in regard to reinstating Jones in the premises on favorable terms.

It appears from the testimony of Graham and of Gillespie, secretary of Breen & Kennedy, that after the death of Martin Breen in 1911 a settlement of all business affairs existing between Graham & Sons and Breen & Kennedy, and Martin Breen personally, was had; that at that time the last of said series of notes (the one maturing June 15, 1909, and which Jones did not pay) was turned over to Breen & Kennedy, and at the time of the trial this note was in its possession; and that neither Breen & Kennedy nor Graham & Sons ever filed any claim therefor in the bankruptcy proceedings.

HENRY HORNER and LLOYD C. WHITMAN, for appellant; LLOYD C. WHITMAN, of counsel.

RYAN & CONDON, for appellees; IRVIN I. LIVINGSTON and LEON LEWIS, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Section 60a of the Bankruptcy Act provides, in substance, that a person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition made a transfer of any of his property, and the effect of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Section 60b of said Act, in force in 1909, provides that "if the bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

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The evidence introduced by the plaintiff (the trustee) in this case showed that the bankrupt, Jones, within four months before the filing of the involuntary petition in bankruptcy against him and while he was in fact insolvent, made two payments aggregating the sum of \$5,437.50, out of his assets, to the defendant Andrew J. Graham, doing business as Graham & Sons, bankers, to take up five notes previously given by him, and it was stipulated, in substance, that the effect of such payments enabled Graham, or the person benefited, to obtain a greater percentage of his debt than other of Jones' creditors of the same class.

Counsel for plaintiff contend, in substance, that the trial court erred in instructing the jury, at the close of plaintiff's evidence, to find the issues in favor of both defendants and in entering judgment against the plaintiff, (1) because the evidence tended to prove that Jones gave a preference and that *both* Graham, who received the preference, and Breen & Kennedy, who was benefited thereby, had reasonable cause to believe that a preference was intended; and (2) because the action was one in tort, and the evidence tended to prove that Jones gave a preference and that *either* Graham *or* Breen & Kennedy had reasonable cause to believe that a preference was intended. As to the second contention, counsel state in their reply brief: "The question turns on the form of the action. If the action was an action in contract and this court is of the opinion that the appellant failed to make out a case against one appellee, this court will affirm the judgment of the trial court in favor of both appellees."

In order to recover in this case, the trustee was required to prove by sufficient evidence not only that the bankrupt had made a payment which had the effect of a preference, as defined in said section 60a, but also that the defendants had reasonable cause to believe that a preference was intended. *Debus v. Yates*, 193

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Fed. 427; *Kimmerle v. Farr*, 111 C. C. A. 27, 189 Fed. 295. When a debtor pays, and a creditor receives, the amount of a just debt, the natural presumptions are in favor of the good faith of the transaction, and the burden of proof to show that the creditor had reasonable cause to believe that a preference was intended is upon the trustee. *Tumlin v. Bryan*, 91 C. C. A. 200, 165 Fed. 166, 168; *Getts v. Janesville Grocery Co.*, 163 Fed. 417, 420; *Chisholm v. First Nat. Bank of Leroy*, 176 Ill. App. 382, 390. The creditor must have reasonable cause to believe (1) that the debtor was in fact insolvent and (2) that the debtor intended by the payment to give him a preference. Counsel for plaintiff contend that the test is whether the facts and circumstances within the knowledge of the creditor are sufficient to put him on inquiry to ascertain whether the debtor was insolvent and that the payment was intended as a preference. We do not so construe the act. In *Blankenbaker v. Charleston State Bank*, 111 Ill. App. 393, 394, it is said: "The creditor is bound only by the information he has at the time he receives payment and is not obliged to trace to the ultimate any suspicious circumstances that may exist within his knowledge, to ascertain whether such payment would be void within the law. Neither is it enough that a creditor has some cause to suspect that payment to him was intended as a preference." See also *Grant v. National Bank*, 97 U. S. 80; *Powell v. Gate City Bank*, 178 Fed. 609, 617; *Tumlin v. Bryan*, *supra*. And the reasonable implication of the statute is that the debtor himself must have intended to give a preference. *Tumlin v. Bryan*, *supra*; *In re First Nat. Bank of Louisville*, 84 C. C. A. 16, 155 Fed. 100, 103; *Hardy v. Gray*, 75 C. C. A. 562, 144 Fed. 922, 925. And "a presumption of law that the debtor intended to give a preference does not arise from the fact alone that he knew himself to be insolvent. * * * It will often, if not generally, happen that a person, though in fact insolvent, will, while continuing his business in the usual

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way, make payments without a thought of disparagement of other creditors and with confidence in his ability to pay them all. * * * Neither is the creditor's belief that the debtor is insolvent in itself equivalent to a belief that he intends a preference. * * * The creditor * * * 'may share in the confidence of his debtor, and may well suppose that the debtor while paying him his debt in the common course of business is acting without any purpose of giving special favor.' '' *Kimmerle v. Farr*, 111 C. C. A. 27, 189 Fed. 295, 300.

After a careful consideration of the evidence we are of the opinion that plaintiff did not sufficiently prove that when Jones made said payments to Graham in January and February, 1909, he intended to give a preference, or that Graham, when he received those payments, had reasonable cause to believe that a preference was intended. Though Jones may have known he was insolvent at the time, the evidence shows that when he made said payments he, relying on his landlord's promise to rebuild the burned premises, expected to re-establish his former large restaurant business there, and wanted to keep his credit good with Graham and stop the running of interest on said notes. And the evidence does not tend to show that at the time of the receipt of said payments Graham, or any one connected with his bank, knew of Jones' actual financial condition, or had made any investigation thereof subsequent to October, 1907. Indeed, the evidence shows that Graham did not personally see Jones or communicate with him from the time of the fire until after the filing of the bankruptcy petition. The fact that Graham may have known that the February, 1909, payment included three notes not yet due is not conclusive that Graham had reasonable cause to believe that a preference was intended. *Sparks v. Marsh*, 177 Fed. 739, 743.

It is the law that an indorser or guarantor of a note of a bankrupt is a creditor within the meaning of section 60b of the Bankruptcy Act, so as to charge him

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with a preferential payment made to the holder of the note (*Swarts v. Siegel*, 54 C. C. A. 399, 117 Fed. 13; *Paper v. Stern*, 117 C. C. A. 346, 198 Fed. 642), and that both the owner of the note and the indorser or guarantor may be charged for the receipt of a preferential payment made to the holder, but that only the amount by which the assets of the estate have thereby been depleted must be returned. *In re George M. Hill Co.*, 64 C. C. A. 561, 130 Fed. 315, 318. Council for plaintiff, in substance, contend that the evidence showed that Breen & Kennedy was secondarily liable on said five notes which were paid to Graham, the holder, and that Breen & Kennedy was benefited by the preference given by Jones and had reasonable cause to believe that a preference was intended. We do not think that the evidence sufficiently proved either that Breen & Kennedy had reasonable cause to believe that a preference was intended or that Breen & Kennedy was secondarily liable on said notes. No indorsement or guaranty of Breen & Kennedy appeared on the notes, and according to the testimony of both Martin Breen and Graham there was no written agreement or oral promise made by Breen & Kennedy, or by Martin Breen individually in its behalf, to hold Graham harmless on the notes. It may be that Graham may have expected that Breen & Kennedy would make any loss thereon good, but it does not appear that Breen & Kennedy was under any legal liability to do so. Furthermore, it does not sufficiently appear that Breen & Kennedy advised, counseled or procured the payments to be made or that it had knowledge of the payments until after they had been made. *Reber v. Shulman*, 106 C. C. A. 110, 183 Fed. 564, 566.

And we are of the opinion that the action, as disclosed from plaintiff's second amended statement of claim and upon which the case was tried, is one in contract and not in tort. The action was for the recovery of a certain sum of money, with interest thereon from

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a certain named date. In *Walter Cabinet Co. v. Russell*, 250 Ill. 416, 420, it is said: "The object of the rules requiring statements of claim and of set-off is to inform the parties of the nature of the respective claims, and * * * It is still the law in the Municipal Court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment. The issue is made by the statement of claim, and the evidence must be limited by that statement." Furthermore, the case appears to have been tried upon the theory that it was an action in contract, and the plaintiff should not be heard to say in this court that the action was one in tort. "A party is bound, in the Appellate Court, as to the nature and form of the action, by the theory on which it was tried. Thus, where a cause has been tried upon the theory that it is an action in tort, and not in contract, that theory will govern the cause in the Appellate Court." 2 Cyc. 671. This being an action in contract against two defendants, plaintiff was required to prove a cause of action against both. *Griffith v. Furry*, 30 Ill. 251, 255; *Cassady v. Trustees of Schools*, 105 Ill. 560, 565; *M. W. Powell Co. v. Finn*, 198 Ill. 567, 569. This, in our opinion, plaintiff did not do.

And we do not think that the trial court committed any prejudicial error in rulings on evidence, as contended by counsel.

The judgment of the Municipal Court is affirmed.
Affirmed.

**Charles A. Butler, Appellant, v. George Kirby and
Helena C. Kirby, Appellees.**

Gen. No. 19,789. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 6, 1914.

Statement of the Case.

Bill by Charles A. Butler against George Kirby, Helena C. Kirby (wife of George Kirby) and William Muhlenfeld to set aside a conveyance. The bill alleged, *inter alia*, that on November 13, 1912, Butler recovered a judgment in the Municipal Court of Chicago against said George Kirby in the sum of \$1,598.59, upon which execution was issued and returned unsatisfied; that previous to the rendition of said judgment George Kirby was the owner of an undivided one-half interest, as joint tenant with said Helena C. Kirby, in certain premises in Cook county; that on February 2, 1912, previous to the rendition of said judgment but after the indebtedness upon which the same was rendered had accrued, Helena C. Kirby and George Kirby, with the intention of defrauding complainant and other creditors of George Kirby out of their just demands, conveyed said premises to said William Muhlenfeld for the consideration of \$10, and that on the same day said Muhlenfeld conveyed the premises for a like consideration to said Helena C. Kirby. The bill prayed, *inter alia*, that as to the complainant said conveyances be set aside and declared null and void. The defendants, George Kirby and Helena C. Kirby, filed their joint and several answer, denying that complainant was entitled to the relief sought, and subsequently the case was heard by the chancellor in open court, resulting in the entry of a decree dismissing the

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bill for want of equity, from which decree this appeal is prosecuted.

It appears that on January 4, 1911, the defendant Helena C. Kirby (then Helena C. Adamick) was married to said defendant George Kirby; that at the time of said marriage she was the owner in her own right of cash and securities of the value of more than \$10,000; that in May, 1911, she purchased the premises in question, paying therefor with her own money the sum of \$6,000 in cash and assuming an existing mortgage thereon of \$10,000; that at the earnest solicitation of George Kirby the deed to said premises was made to Helena C. Kirby and George Kirby, as joint tenants; that on February 2, 1912, Helena C. Kirby insisted that, as the property belonged to her, she be given the exclusive legal title therein, and that on said date the deeds to Muhlenfeld and from Muhlenfeld to her were executed and recorded.

CHARLES A. BUTLER, for appellant; FRANKLIN RABER, of counsel.

GEORGE E. SWARTZ, for appellees.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

FRAUDULENT CONVEYANCES, § 270*—*when evidence insufficient to show.* On bill to set aside a conveyance between husband and wife on the ground that it was executed to defraud complainant and other creditors of the husband, evidence held insufficient to show such fraud, it appearing that the conveyance was made more than nine months before complainant recovered a judgment against the husband, and that the wife did not know of her husband's indebtedness to complainant until after the conveyance, and it also appearing that the premises were purchased with the wife's money.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Henry Friedman, Appellee, v. Northwestern Terra Cotta Company, Appellant.

Gen. No. 19, 829. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PERRE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed October 6, 1914.

Statement of the Case.

Action by Henry Friedman against Northwestern Terra Cotta Company, a corporation, to recover a sum alleged to be due to the plaintiff as commissions upon sales of terra cotta products made by him while in the employ of defendant. From a judgment entered on a verdict in favor of plaintiff for \$36,536.14, defendant appeals.

The facts showed that plaintiff had been in defendant's employ for many years and was engaged at a salary of \$5,000 per year during 1910 and 1911; that in the year 1910, after plaintiff had requested that he be made a stockholder and officer of the company, the vice-president in reply did not make any definite promise as to plaintiff's request, but said at the end of the year he would pay to plaintiff and others, as a bonus, a "percentage of the profits" of the business, if any. It appeared that plaintiff was not informed what the percentage was, but at the end of the year 1910 plaintiff was paid \$4,198.24. Plaintiff continued in his employment until January 15, 1912, when he resigned. Later plaintiff made a request for his percentage for the year 1911 and received a check for \$302.86. Plaintiff sought to find out how the percentage was figured but the vice-president refused to tell him. Plaintiff then employed an attorney who, under plaintiff's express direction and authority, wrote to the vice-president a letter as follows:

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“Mr. Henry Friedman has called on me in relation to a *claim for bonus* promised him on contracts closed by him for your company during the year 1911. It is Mr. Friedman’s contention that although a bonus was promised him based on *earnings on contracts* secured by him, that after he resigned his connection with your company that you advised him that the company had made no money during 1911, and consequently a very nominal bonus was paid. During the year 1910 when Mr. Friedman succeeded in closing only a few contracts a considerable bonus was paid to him, and consequently he continued during 1911 with your company and redoubled his efforts, anticipating a fair remuneration for the same. Your president, Mr. Hottinger, also *held out hopes* to Mr. Friedman that he would be more closely associated with your company in an official capacity and would be *liberally rewarded* at the end of the year on certain good contracts closed in which Mr. Friedman succeeded in obtaining preference and by helping to eliminate from this field certain other contracting companies.

“Is it not possible to amicably adjust this matter without filing a bill in chancery to compel an accounting? Kindly advise me.

Yours very truly,

Geo. D. Wellington.”

HUGH L. BURNHAM, for appellant.

GEORGE D. WELLINGTON and ROCKHOLD & BUSCH, for appellee; FRANCIS X. BUSCH, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

MASTER AND SERVANT, § 82*—*admissibility of letter written at direction of employee in suit for compensation.* In an action to recover a certain commission on sales made of defendant’s products by plaintiff while in defendant’s employment on a salary, where the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Job et al. v. Wallace, 188 Ill. App. 485.

real issue was whether the defendant verbally agreed to give plaintiff in addition to his salary a certain "commission" on sales made by him, or a "percentage of the profits" of the business, as a bonus, a letter written by the attorney of plaintiff at the latter's direction to the defendant and offered in evidence to impeach plaintiff's testimony to the effect that the agreement was to give a certain commission on sales, *held* not to contain an offer to compromise so as to render it inadmissible, and its rejection *held* prejudicial error.

**Frederick W. Job and Dudley Taylor, Appellees, v.
Henry M. Wallace, Appellant.**

Gen. No. 19,838. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 6, 1914.

Statement of the Case.

Action by Frederick W. Job and Dudley Taylor against Henry M. Wallace to recover a certain sum claimed to be due on a written contract for attorneys' fees. The case was tried before a jury who returned a verdict in favor of plaintiffs for \$1,600. The court required a remittitur of \$125 and entered judgment for \$1,475. To reverse the judgment, defendant appeals.

PAUL M. O'DONNELL, for appellant.

IRA C. WOOD, for appellees.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Hovey v. Matteson, 188 Ill. App. 486.

Abstract of the Decision.

1. **ATTORNEY AND CLIENT, § 135***—*sufficiency of evidence*. In an action by attorneys upon a written contract to recover attorneys' fees, evidence *held* insufficient to show that plaintiffs repudiated their contract, or that the contract sued on had for its consideration the agreement of plaintiffs to commence groundless suits on behalf of defendant.

2. **MUNICIPAL COURT OF CHICAGO, § 17***—*when oral charge to jury not misleading*. In an action on a written contract for services, the giving of an oral instruction telling the jury that the terms of a written contract cannot be changed by oral evidence, *held* not misleading where both parties testified fully as to the conversations had prior to signing the contract, and no specific objection was made to the charge at the time.

3. **MUNICIPAL COURT OF CHICAGO, § 17***—*when giving of oral charge to jury not error*. The giving of an oral charge to the jury that if they find for the plaintiffs they should find plaintiffs' damages at a certain sum together with interest, *held* not error in view of the pleadings and the evidence, the suit being upon a specific contract and no attempt made to recover upon a *quantum meruit*.

4. **MUNICIPAL COURT OF CHICAGO, § 17***—*when offered written instructions may be refused*. Where a judge of the Municipal Court elects to instruct the jury orally, he may refuse to give offered written instructions.

Charles M. Hovey, Appellee, v. D. A. Matteson, Appellant.

Gen. No. 19,852. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOSEPH SABATH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed with finding of fact. Opinion filed October 6, 1914.

Statement of the Case.

Action by Charles M. Hovey against D. A. Matteson to recover commissions claimed to be due plaintiff as a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hovey v. Matteson, 188 Ill. App. 486.

licensed real estate broker for procuring an exchange of defendant's fifteen-flat building for another flat building. From a judgment entered on a verdict in favor of plaintiff for \$1,193, defendant appeals.

Plaintiff's statement of claim alleged, in substance, that the defendant "listed" said building with plaintiff and "agreed thereby to pay the customary commission" in case plaintiff found a customer; that such customary commission is two and one-half per cent.; that plaintiff found a customer, one Emanuel Leavitt, who purchased the property at the price of \$47,500, and that, therefore, plaintiff claimed a commission of two and one-half per cent. on the amount of the property sold for. In defendant's affidavit of merits it was alleged, in substance, that plaintiff did not procure said Leavitt as a customer for defendant's building; that said building was exchanged for another building owned by said Leavitt, which latter building was of a value much less than \$47,500; that another real estate broker, named Gripp, was the procuring cause of such exchange, and that plaintiff at the time was acting as a broker for said Leavitt.

R. D. MATTESON, for appellant; D. S. WEGG, of counsel.

GEORGE H. MASON, for appellee; FRED B. HOVEY, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 51***—*when broker not procuring cause of exchange of real estate.* In an action for brokerage commissions for procuring an exchange of real estate, evidence held insufficient to show that plaintiff was the procuring cause in bringing about the agreement for the exchange, it appearing that the defendant had listed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lorenze v. Four Wheel Drive Auto Co., 188 Ill. App. 480.

his property with plaintiff and another real estate broker and that the latter broker first directed the attention of the defendant to property listed with him for exchange and brought about an agreement for the exchange, and there being no evidence to show that defendant did not remain neutral as between plaintiff and the other broker, or that defendant was guilty of any wrong to plaintiff.

2. **BROKERS, § 84***—*admissibility of evidence.* In an action for brokerage commissions for procuring an exchange of real estate owned by defendant, where it appeared that another broker with whom the property was also listed, consummated the exchange, *held* that a carbon copy of a letter written by plaintiff to defendant after the exchange had been consummated, in which he stated a history of the dealings and relations of the parties and expressed surprise at the "clandestine" manner in which the negotiations had been carried on, etc., was a self-serving document and apparently written in preparation of making a claim against defendant for commissions, and *held* that its admission in evidence on behalf of plaintiff tended to prejudice the jury in favor of plaintiff.

3. **BROKERS, § 99***—*when instruction on amount of compensation erroneous.* In an action in the Municipal Court for commissions in procuring an exchange of real estate for defendant, where there was no special agreement as to the rate of the commissions, the giving of an oral charge to the jury in which they were told that if they found the issues for plaintiff their verdict must be for a certain sum, which was computed at a certain rate on the trade value, *held* error where there was testimony that the rate used in computing the sum was the customary charge, but where there was no testimony of the custom on what that rate was figured, whether on the actual or trade value, and where there was testimony as to the custom, whether said rate was figured on the value of the property less the mortgage or not.

**Abraham Lorenze, Appellant, v. Four Wheel Drive
Auto Company, Appellee.**

Gen. No. 19,864. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 6, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Statement of the Case.

Attachment suit commenced in the Municipal Court of Chicago by Abraham Lorenze against Four Wheel Drive Auto Company, a corporation, having its principal office in Clintonville, Wisconsin, to recover commissions alleged in plaintiff's statement of claim to be due him for selling one hundred shares of defendant's corporate stock. The defendant entered its general appearance and filed an affidavit of merits stating that it was not indebted to plaintiff in any sum whatever, that plaintiff did not make a sale of said shares of stock on behalf of defendant, and that defendant never had any contractual relations with plaintiff as to the sale of said stock. The case was tried before the court without a jury, resulting in a finding and judgment for defendant. To reverse the judgment, plaintiff appeals.

MORTON A. MERGENTHEIM, for appellant; MYER LINKER, of counsel.

CULVER, ANDREWS & KING, for appellee.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

BROKERS, § 88*—*when evidence insufficient to show liability of principal to pay commissions to subagent.* In an action against a corporation to recover commissions for selling defendant's capital stock, where the facts showed that defendant had entered into a written agreement with its president giving him exclusive right to sell such stock at a certain commission on certain conditions, and that the president had entered into an agreement with plaintiff giving the exclusive right to sell a portion of the stock in certain territory subject to the president's agreement with the corporation, and there was testimony, which was contradicted, that plaintiff subsequently entered into a verbal agreement with the president

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and treasurer of the defendant whereby plaintiff was to make sales on behalf of the defendant Company, *held* that a finding and judgment in favor of defendant was sustained by the evidence, it not appearing that the agreement between the president and the defendant had been cancelled, and it not sufficiently appearing that plaintiff made a verbal agreement with defendant whereby the latter was to pay him commissions on stock sold by him, or that defendant by its acts at any time recognized that it had contractual relations with plaintiff.

**Helen Neenan, Appellee, v. National Council of the
Knights and Ladies of Security, Appellant.**

Gen. No. 19,874. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed with finding of facts. Opinion filed October 6, 1914. Rehearing denied November 4, 1914.

Statement of the Case.

Action by Helen Neenan against National Council of the Knights and Ladies of Security to recover insurance alleged to be due plaintiff as beneficiary on a certificate issued to plaintiff's husband. From a judgment for plaintiff for \$920, defendant appeals.

In plaintiff's declaration, which consisted of one count, it was alleged, in substance, that on September 3, 1908, the defendant admitted Jeremiah Neenan to membership in the local council, No. 741, of the Order, located in Chicago, and issued to him a beneficiary certificate, duly signed by the officers of the national council of the defendant society, and duly signed by said Neenan "for the purpose of accepting the conditions of said certificate"; that defendant by said certificate promised to pay plaintiff, wife of said Neenan, upon his death the sum of \$1,000, upon the terms

and conditions in said certificate mentioned; that said Neenan died on October 7, 1909, at Chicago, while in good standing in said Order; that he during his lifetime, and plaintiff at all times since his death, complied with all the requirements of the certificate and the laws of the Order; that by means thereof defendant became liable to pay plaintiff the sum of \$1000; and that defendant has refused to pay said sum or any part thereof, wherefore there is due to plaintiff the said sum, together with interest thereon, at five per cent. per annum, from August 12, 1910, etc. The beneficiary certificate was set out *in haec verba* in the declaration, and in one clause thereof it was provided that should said Neenan die within eighteen months of the delivery of the certificate the National Council should be liable for only eighty per cent. of said \$1,000.

The defendant filed a plea of the general issue and several special pleas, all of which, except the sixth, were withdrawn. This sixth plea, as amended, alleged in substance that the contract of membership between the defendant and said Jeremiah Neenan was composed of the certificate, application and by-laws of the defendant society; that it was provided in the by-laws that each member should pay one assessment each month on or before the last day of the month; and that if the member failed to pay said monthly assessment on or before the last day of said month said member should stand suspended without notice and all his rights forfeited under said certificate, but that he might reinstate himself at any time within sixty days from the date of said suspension by the payment of the current assessment and local council dues, and all arrearages of any kind, *provided* he be *in good health*; that by virtue of the contract between said Neenan and the defendant society there became due on August 1, 1909, a certain assessment from said Neenan, payable on or before the last day of said month of August, and that there became due on September 1, 1909, a certain assessment from said Neenan, payable on or be-

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fore the last day of said month of September; that said August assessment was not paid during said month of August or during said month of September, and said September assessment was not paid during said month of September; that said Neenan became suspended on September 1, 1909, and remained in suspension up to and including the time of his death, October 7, 1909, and was not a member of the defendant society in good standing at the date of his death, and that neither he, nor anyone in his behalf, while he was living and in good health, paid any assessment for the purpose of reinstating him; that on or about October 7, 1909, while said Neenan was in suspension and *not in good health*, assessments for the months of August, September and October, 1909, amounting to \$4.50, were paid to the financier of said local council to which said Neenan belonged, and said payments were taken by said financier *without knowledge* on his part, or that of any officer or agent of the Order, that said Neenan was not in good health; that thereafter, and immediately upon defendant learning that said Neenan was not in good health when said payments were made and before the beginning of this suit, said financier sent to plaintiff a check for the amount of said payments, which check has not been returned but has been retained by plaintiff, and which check has been at all times of the value of said payments.

To this special plea the plaintiff filed a replication in which it was alleged, in substance, that said Neenan was a member of the defendant society in good standing, as provided for in said contract, up to and including the time of his death; that while living and in good health he paid all assessments due from him for the purpose of his reinstatement and which did reinstate him before he died; that on October 7, 1909, "while the said Neenan was in good health," assessments for said months of August, September and October,

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amounting to \$4.50, were paid to and taken by said financier and the latter did not return "to said Neenan" the amount paid by plaintiff.

A. W. FULTON, for appellant.

ANTOINETTE FUNK and F. PHILIP YOUNG, for appellee; WALTER T. STANTON and FRANK J. CORB, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. **INSURANCE, § 746***—*contract of insurance in fraternal beneficiary society.* The constitution and by-laws, the application for membership and the benefit certificate constitute the contract of insurance in a fraternal beneficiary society.

2. **INSURANCE, § 741***—*when by-law of benefit society self-executing.* A by-law of a beneficiary society providing that a member who has not paid his assessments or dues on or before the last day of the month shall stand suspended without notice, etc., held self-executing and to cause a member who failed to comply with it to be *ipso facto* suspended and to forfeit all rights under his certificate.

3. **INSURANCE, § 807***—*what not a reinstatement of a suspended member in a beneficiary society.* Under a by-law of a benefit society which provides that any member suspended for nonpayment of dues and assessments may be reinstated by payment of all arrearages within sixty days from date of suspension, if he is in good health at the time of reinstatement, a suspended member is not reinstated by the beneficiary causing the arrearages to be paid to the financier of the local lodge while the member was in the last stages of a mortal illness, where the financier accepted such payment without any knowledge of the member's illness, there being also a further provision in the by-law that the receipt and retention of assessments and dues, in case the suspended member is not in good health, shall not have the effect of reinstating him.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. INSURANCE, § 793*—*what not a waiver of prompt payments of dues and assessments.* A private agreement between the beneficiary in the certificate of a member of a benefit society and the financier of the local lodge whereby the financier agreed to advance the assessments and dues for one month or more in case they were not paid by the member or the beneficiary held not to disclose any waiver on the part of the society with reference to the prompt payment of dues and assessments, for the reason it was not shown to have been known by the member or the principal lodge and that the agreement was beyond the scope of the authority of the financier to make.

5. INSURANCE, § 786*—*when evidence of custom to extend leniency in payment of dues and assessments incompetent.* In an action against a benefit society to recover insurance where the defense was that the member had by virtue of a by-law been *ipso facto* suspended for failure to make prompt payment of monthly assessments, evidence offered to show that leniency had been extended customarily by the local lodge to certain members thereof as to the payment of assessments held incompetent.

Lawrence Doherty, Appellee, v. Western United Gas & Electric Company, Appellant.

Gen. No. 19,887.

1. MASTER AND SERVANT, § 98*—*what not a "workshop" within meaning of Factory Act.* A pit or manhole in a street constructed and used by a gas company and located about two miles from its gas plant, held not to be a "workshop" within the meaning of section 12 of the Factory Act of 1909, J. & A. ¶ 5397, providing that workshops shall be kept free from gas, etc., it appearing that a gas main passed through the pit, that in the pit there were two valves on the gas main, a governor controlling the pressure of gas and indicators to register the pressure, and that the gas which passed through the main was the finished product.

2. EVIDENCE, § 399*—*when opinion of expert improper as being on an ultimate fact.* In an action by an employee to recover for personal injuries caused by inhaling gas which it was alleged defendant allowed to escape in a manhole, permitting an expert witness in answer to a hypothetical question to, in effect, give his opinion that plaintiff's unconsciousness was caused by inhaling

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the gas, *held* error for the reason that it, in effect, allowed him to give his opinion as to an ultimate fact, which was a question for the jury, it appearing that defendant pleaded the general issue to plaintiff's declaration and at the trial made no admission of plaintiff's injury, but denied that plaintiff inhaled gas at the manhole.

Appeal from the Circuit Court of Cook county; the Hon. HARRY C. MORAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed October 6, 1914. Rehearing denied October 17, 1914.

Statement by the Court. This is an appeal from a judgment for \$7,500 rendered by the Circuit Court of Cook county in favor of Lawrence Doherty, plaintiff, in an action for damages for personal injuries.

The defendant corporation was in the business of manufacturing and selling illuminating gas. At the intersection of Brainard and Ogden avenues in La Grange, Illinois, and about two miles from its manufacturing plant, defendant maintained and operated a governor pit, or manhole, in the street, five feet deep and five feet square. Running through this pit, or underground compartment, was a gas main, on which were two valves and a governor which controlled the gas pressure, and in the pit were two indicators which registered the gas pressure on charts. The walls of the pit were made of brick covered with cement and the roof and floor were of concrete. The opening into the pit was about two feet square, covered with a heavy, unperforated, iron manhole cover.

Plaintiff on the day of the accident, June 15, 1910, was nearly nineteen years of age, and had been employed by defendant for about three years. For the first two years he called at houses and read gas meters. For more than a year prior to the accident he worked as a gas fitter, repairing leaks and attending to "trouble tickets," and during this time it was his

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duty to go down into said governor pit every morning and evening and regulate the gas pressure, change certain charts and ink the pens used to record the pressure of the gas. He was the only employee of defendant who went there regularly.

Plaintiff testified that about 5:30 A. M., on the day mentioned, he rode to the pit on his bicycle, lifted off the manhole cover, noticed the odor of illuminating gas coming from the pit, waited about two minutes "to ventilate the place" as he always did, and then went into the pit to attend to his duties; that after being there about three minutes he felt "a singing in the ears and getting weak in the knees" and he came out, staggered a little, walked to the curb and in the park for a few minutes, and then returned and put back the heavy manhole cover; that then he walked for a short distance leading his bicycle, then mounted the bicycle and rode to the Stone avenue railroad station some distance away; that upon arriving at the station he felt nauseated and sat down upon a bench; that then he delivered a newspaper at a house about three hundred feet away, as was his custom every morning, and then returned to the station and again sat down because his sickness kept increasing; that then he started for home, walked a few steps, fell, and that was the last he remembered until several days thereafter. He was found by John McKay, a newsboy, and Walter McGarry, lying at the foot of a flight of concrete steps, running into the basement of the station, down which he had apparently fallen. He was picked up insensible and taken to his home, where an examination revealed a contusion on his head and bruises on his body. He remained in an unconscious state for three days, succeeded by severe convulsions which gradually subsided. In about three weeks he was able to leave the house and he took a lake trip at his physician's suggestion. He returned to work

for defendant some time in August, 1910, and continued in its employ until about February 1, 1911, when he went to work for the Pullman Company. In the fall of 1912 he entered the University of Illinois, and continued his studies there until the time of the trial.

Plaintiff's witness, John McKay, the newsboy, testified to the effect that each morning he was accustomed to "run a race" with the plaintiff to see which one would deliver a newspaper and return to the station first, and that shortly before the witness found plaintiff lying at the foot of said steps on the morning mentioned he had run his usual race with plaintiff. Plaintiff's witness, Walter McGarry, testified that at the time he assisted in picking up plaintiff from the foot of said steps there was a "kind of driveling on the mouth, something like frothing." Plaintiff further testified that prior to June 15, 1910, he never had had any fainting or dizzy spells, but that on several different occasions afterwards he had such spells, following violent exercise, and that his elder brother had died of epilepsy in 1905.

The testimony of several of plaintiff's witnesses tended to show that he was not as bright mentally as before the accident, and that he had great difficulty in the control of his speech, while formerly he was ready of speech. One of the medical experts, called by plaintiff, expressed the opinion that plaintiff had a brain injury, that he would probably lose mental power as he grew older and that he might ultimately become insane.

On direct examination plaintiff testified that on the morning mentioned gas was leaking into the pit because one of the valves was not tight. On cross-examination he testified that he did not know that there was a leak at that particular time, but that because he smelled gas he assumed there was a leak; that he knew that gas was dangerous and that if he inhaled enough it would "knock him out."

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The theory of plaintiff's case was that his loss of consciousness and fall, his subsequent convulsions, dizzy spells, weakening of mental powers, etc., were the result of his having inhaled illuminating gas, because of the negligence of defendant, during the few minutes he was in the pit on the morning mentioned. Testimony of two medical experts was introduced in support of this theory.

Plaintiff's declaration consisted of eleven counts. Seven counts were based upon the alleged violation of the common-law duty of defendant to furnish plaintiff a safe place to work, and to warn plaintiff. Four counts alleged that the pit or manhole was a "workshop" within the meaning of the act, commonly known as the "Factory Act," and entitled "An Act to provide for the health, safety and comfort of employes of factories, mercantile establishments, mills and workshops in this State, and to provide for the enforcement thereof," approved June 4, 1909, and said counts were based upon the alleged violation of section 12 of that Act. (J. & A. ¶ 5397.) To all counts defendant pleaded the general issue. In section 29 of the Act (Hurd's St. 1909, ch. 48, par. 117, J. & A. ¶ 5414) it is stated:

"The term 'mill or workshop' shall include any premises, room or apartment not being a factory as above defined, wherein any labor is exercised by way of trade or for the purpose of gain in or incidental to any process of making, altering, preparing, cleaning, repairing, ornamenting, finishing or adapting for sale any article or part of any article, and to which or over which building, premises, room or apartment, the employer of the person employed or working therein has the right of access or control; * * *"

Section 12 of the Act (J. & A. ¶ 5397), which it was alleged that defendant had violated, is as follows:

"All factories, mercantile establishments, mills or workshops shall be kept free from any gas or effluvia arising from any sewer, drain, privy or other nuisance on the premises. All poisonous or noxious fumes or

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gases arising from any *process*, and all dust of a character injurious to the health of the persons employed, which is *created* in the course of a *manufacturing* process, *within* such factory, mill or workshop, shall be removed, as far as practicable, by either ventilating or exhaust devices.”

Plaintiff's evidence tended to prove that illuminating gas was a poisonous or noxious gas, and that it was practicable to remove such gas from the pit or manhole by means of ventilating or exhaust devices.

The various defenses urged at the trial were, in substance, that there was no gas escaping in the pit on the morning mentioned; that the defendant was not guilty of any negligence; that if plaintiff was injured by inhaling gas in said pit, as alleged, he assumed the risk or was guilty of such contributory negligence as barred a recovery; and that plaintiff's unconsciousness and fall at the railroad station, his subsequent convulsions, dizzy spells, weakening of mental powers, etc., were not the result of any inhalation of gas, as alleged, but of an epileptic fit. There was testimony tending to support these defenses. The defendant further contended at the trial that the pit or manhole was not a “workshop” within the meaning of said “Factory Act,” and that even if a poisonous or noxious gas was arising on the morning mentioned in said pit or manhole, which was about two miles from defendant's plant, it was not a gas arising from any *process*, or created in the course of a *manufacturing* process *within* such workshop.

At the conclusion of plaintiff's evidence the defendant moved for a directed verdict in its favor, but the motion was denied. The defendant thereupon moved that the court instruct the jury to find the defendant not guilty on each of the four counts based upon said act, but the motions were severally denied. All of these motions were renewed at the close of all the evidence and again denied. Among the refused

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instructions offered by the defendant was one to the effect that there could be no recovery upon the ground that defendant had failed to comply with said "Factory Act," and another to the effect that the provisions of section 12 of said Act did not apply to the pit or manhole in question. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$7,500, upon which verdict the judgment appealed from was entered.

KRAUS, ALSCHULER & HOLDEN and ALSCHULER, PUTNAM & JAMES, for appellant.

ALBERT L. HOPKINS and S. W. GEHR, for appellee.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Many points are urged by counsel for defendant as reasons for the reversal of the judgment. We shall consider two.

It is contended that the trial court erred in holding, in effect, that plaintiff could recover on each of said four counts based upon the alleged violation by defendant of section 12 of said "Factory Act." After careful consideration, we are of the opinion that the court erred in so holding and in refusing to instruct the jury, on defendant's motion, to find the defendant not guilty on each of said counts. We think that the pit or manhole was not a "workshop" within the meaning of said act. The evidence shows that defendant's manufactured product, i. e., illuminating gas, left its gas plant, which was about two miles from said pit or manhole, as a finished product. Nothing further remained to be done in "making, altering, preparing, cleaning, repairing, ornamenting, finishing or adapting for sale" said product. It appears that in the manhole there were two valves on a gas main, a governor controlling the pressure of the gas, and indicators to register that pressure, and that plaintiff's

duties were to visit the manhole twice a day, turn a valve, change certain charts and ink certain pens. Neither plaintiff nor any one else performed any labor in the manhole upon the product itself. The manhole was a part of defendant's system of distributing its product to its customers. And we think the word "workshop," as used in said act, means the place where the work of making, altering, etc., is done upon the product. In 40 Cyc. 2862, the term "Workshop" is defined as "a shop where any manufacture or handiwork is carried on, whether for the purpose of repair or manufacture. In 7 Words & Phrases, 6494, it is stated that a shop "is understood to be a building in which an artisan carries on his business, or laborers, workmen, or mechanics, by the use of tools or machinery, manufacture, alter or repair articles of trade." In *Spacey v. Dowlais Gas and Coke Co.*, 75 L. J. K. B. (N. S.) 5, it was held that a gas main used to supply gas to the consumers was not a part of the company's factory. Furthermore, even if the manhole in question could be construed to be a "workshop" within the meaning of said act, the proof does not disclose that defendant violated the provision of section 12 of the Act, as alleged in said counts. The first clause of that section provides that "all factories, * * * mills or workshops, shall be kept free from any gas or effluvia arising from any sewer, drain, privy or other nuisance on the premises." There was no evidence that any gas arose from any "sewer, drain, privy or other nuisance on the premises." The second clause of the section provides that "all poisonous or noxious fumes or gases arising from any process, * * * which is created in the course of a manufacturing process, within such factory, mill or workshop, shall be removed, as far as practicable, by either ventilating or exhaust devices." While there was evidence tending to show that it was practicable to remove gas from said manhole by ventilating or exhaust devices, and that there were no such devices

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there installed, there was no evidence tending to show that there were any fumes or gases arising in the manhole on the morning mentioned, "from any *process*, * * * which is *created* in the course of a *manufacturing* process, *within* such factory, mill or workshop."

It is further contended by counsel for the defendant that the trial court erred in allowing one of plaintiff's expert witnesses, Dr. Leipold, in answer to a hypothetical question, objected to by defendant, to testify practically to the effect that in his opinion plaintiff's unconsciousness at said railroad station was caused by poisoning from illuminating gas. To plaintiff's declaration the defendant pleaded the general issue. At the trial there was no admission of an injury to plaintiff, and defendant denied that plaintiff had inhaled illuminating gas at the manhole. We think that the court erred in allowing the witness to, in effect, give his opinion as to an ultimate fact which was to be determined by the jury from all the evidence. *Schlauder v. Chicago & S. Traction Co.*, 253 Ill. 154, 160; *Keefe v. Armour & Co.*, 258 Ill. 28, 33.

For the reasons indicated the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

Elizabeth Stanton, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 19,331. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN A. DOWDALL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed and remanded. Opinion filed October 6, 1914.

Statement of the Case.

Action by Elizabeth Stanton against Chicago City Railway Company to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The declaration contained one count, and alleged that while the plaintiff was entering a street car owned and operated by the defendant in the city of Chicago, and before the plaintiff was able to get securely upon the platform of the car, the defendant, through its servants in charge of the operation and management of the car, negligently started the car forward without notice or warning to her, and with unusual force and violence, so that the plaintiff was thereby thrown from the car to and upon the ground and injured. From a judgment in favor of plaintiff for sixty-five hundred dollars, defendant appeals.

The defendant contends on the record that the verdict and judgment on the issue of liability are manifestly contrary to the preponderance of the evidence; that the damages are grossly excessive on any theory of the injury; that plaintiff's counsel made many improper and incurably prejudicial statements on the trial; that the court erred in giving an improper instruction; and also erred in admitting incompetent evidence.

CHARLES LEROY BROWN, for appellant; LEONARD A. BUSBY, JAMES G. CONDON and WARNER H. ROBINSON, of counsel.

JAMES C. MCSHANE and RICHARD J. FINN, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

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Abstract of the Decision.

1. **APPEAL AND ERROR, § 1514***—*when conduct of counsel in accusing opposing party and counsel of improper motives reversible error.* Misconduct of counsel throughout the trial and in suggesting improper motives to the opposing party and counsel and in making accusations that they were guilty of deception and other dishonorable methods, when there is no basis in the proceedings or the evidence to warrant such insinuations or accusations, *held* reversible error.

2. **CARRIERS, § 482***—*sufficiency of instruction.* In an action against a street railway company to recover for personal injuries alleged to have been caused by the negligence of the defendant in suddenly starting its car when plaintiff was boarding it, an instruction given for plaintiff which told the jury: "If under the evidence and instructions of the court, you find that the defendant is legally liable for and on account of plaintiff's alleged fall from or in connection with the street car; and if you further find from the evidence that plaintiff sustained injury to her spine as a direct and proximate result of said fall; then, and in such event, you are instructed that even though plaintiff had tubercular germs in her blood at the time of said fall, yet, if you further believe from the evidence that as a natural and proximate result of said injury said tubercular germs lodged at the point of said injury, and thereby caused a diseased condition of her spine, and that such diseased condition of her spine would not have occurred except for said fall and injury, then the defendant is legally responsible for said diseased condition of her spine," *held* objectionable as submitting to the jury a question of law, whether the defendant was liable, instead of submitting the question of fact, whether defendant was guilty of negligence in operating the car, but *held* not objectionable as authorizing a recovery for an aggravation of plaintiff's diseased condition on the ground that the declaration did not claim damages therefor.

3. **CARRIERS, § 472***—*when opinion of expert inadmissible as being on an ultimate fact.* In an action against a street railway company for personal injuries sustained by a plaintiff caused by a fall from a car when plaintiff was attempting to board it, permitting an expert witness to give an opinion whether the accident caused or produced plaintiff's subsequent physical condition, *held* improper as permitting the witness to give an opinion on an ultimate fact, it appearing there was a dispute as to the manner of the injury and whether or not the fall was the cause of plaintiff's subsequent condition.

4. **DAMAGES, § 115***—*when recovery for personal injuries excessive.* A verdict of sixty-five hundred dollars for personal in-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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juries alleged to have resulted from a fall, *held* excessive where the only substantial injury claimed by plaintiff was that she suffered from Pott's disease, or tubercular spondylitis, which did not seem to be supported by the evidence, and it appeared that plaintiff had substantially recovered.

Central Trust Company of Illinois, Defendant in Error, v. Louis S. Owsley, Executor, Plaintiff in Error. Impleaded with Inter Ocean Newspaper Company and George W. Hinman, Defendants.

Louis S. Owsley, Executor, Plaintiff in Error, v. Central Trust Company of Illinois, Defendant in Error.

Gen. No. 19,527.

1. **STIPULATIONS, § 20***—*when waives objection to jurisdiction.* A stipulation between the parties *held* to preclude all questions as to the jurisdiction of a court of equity to settle the controversy, and to waive any possible objection which could have been made originally that there was an adequate remedy at law.

2. **ABATEMENT AND REVIVAL, § 41***—*what not a similar action pending.* A petition filed in the Probate Court asking for instructions as to whether a custodian should comply with a demand of the executor to tender back money paid on disputed bond coupons held by it and whether the custodian should demand a return of the coupons, *held* not a similar proceeding pending which would constitute a bar to suit filed in equity for instructions with respect to declaring the principal of the bonds due.

3. **ABATEMENT AND REVIVAL, § 34***—*method of raising objection of another action pending.* Objection to the jurisdiction of the court on the ground there is a prior action pending can only be made by a plea in abatement.

4. **MORTGAGES, § 127***—*duty of trustee as agent of parties.* A trustee in a trust deed given to secure the payment of money is the agent of both parties thereto, and is bound to act fairly and justly towards the debtor as well as towards the creditor, and if the instructions or demands of one party require him to do an illegal or immoral act, he may violate such instructions with impunity.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. MORTGAGES, § 291*—*when failure of trustee to declare principal of bonds due on default in payment of interest not violation of duty.* Where a trust company was made trustee in a trust deed to secure the payment of certain bonds, with a clause in the deed requiring the company upon demand of a majority of the owners of the bonds to declare the principal of the bonds due on default in the payment of interest coupons, and the company after a demand upon it to declare the bonds due received payment of the interest on the overdue coupons and surrendered the coupons to the mortgagor, *held* that the payment of the interest to the company was a valid payment and that the company did not violate its duty in failing to declare the principal of the bonds to be due, it appearing that the bonds and coupons were legally in the possession of the company with authority to demand the interest, which authority had never been withdrawn, and that the Probate Court had assumed and exercised jurisdiction over a majority of the bonds and had directed a sale thereof on the application of the executor of the owner thereof, and that the order of such court had fixed a status of the bonds which the executor could not change by demanding that the company declare the maturity thereof.

Error to the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed October 6, 1914.

Statement by the Court. This writ of error brings before the court for review a final decree entered February 13, 1913, by the Circuit Court of Cook county.

A bill of complaint was filed by the Central Trust Company of Illinois, as trustee under a trust deed executed by the Inter Ocean Newspaper Company, for instructions as to whether it should declare the principal of the bonds due on a written demand from L. S. Owsley, executor of the estate of Charles T. Yerkes, owner of the majority of the bonds, after the necessary default on three sets of coupons, called the "disputed coupons," alleging that as such trustee it is in doubt as to the right of the executor to make such demand by reason of (a) dealings and contracts between the executor and George W. Hinman, president of the Newspaper Company, as to a proposed sale of said

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

bonds and coupons to him, and because of certain orders of the Probate Court; and (b) as to whether the Trust Company, which had possession of said bonds and coupons as custodian of the Yerkes estate by appointment from the Probate Court, rightfully received, subsequent to such written demand, the amount of said overdue coupons and surrendered them to the Newspaper Company.

The bill was answered by the executor, Owsley, and a cross-bill was filed by the executor against the Trust Company to recover damages resulting from the refusal of the Trust Company to declare the principal of the bonds due and wrongfully surrendering the disputed coupons.

Substantially all of the material facts of the case are undisputed and are set forth in the pleadings, in substance, as follows:

The Trust Company was appointed custodian of the securities coming into the possession of the executor under an order of March 15, 1906, which provided that "no securities so deposited with the Trust Company should be withdrawn except by an order of the court and that no cash so deposited should be withdrawn except by an order of the court, or upon vouchers approved by the Trust Company.

The Inter Ocean Company, on January 1, 1907, executed a trust deed or mortgage to the Trust Company to secure an issue of \$600,000 bonds, of which \$400,000 were the property of the executor, a copy of the trust deed or mortgage being attached to the bill; the \$400,000 bonds were deposited with the Trust Company as custodian under an order of the Probate Court of March 15, 1906; the coupons on these bonds due January 1, 1910, July 1, 1910, and January 1, 1911, were not paid when they became due; and at the request of the executor, on March 27, 1911, the Trust Company made due demand for the payment of the disputed coupons, and payment was refused.

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On April 1, 1911, an agreement was made between George W. Hinman, the executor and the Trust Company, as escrow agents, with respect to a proposed sale of the \$400,000 bonds to Hinman. The agreement recited that Hinman had made an offer to the executor, dated March 14, 1911, to purchase the \$400,000 bonds with all unpaid coupons for \$200,000, \$175,000 payable in cash within sixty days after an order had been entered by the Probate Court authorizing the executor to accept the bid, and \$25,000 in a note for one year, properly secured upon certain conditions made in the offer. The agreement provided that Hinman should deposit with the Trust Company \$20,000 as a guaranty that he would carry out the terms of the offer.

June 8, 1911, the executor filed in the Probate Court a petition praying that he be authorized to sell the bonds to Hinman upon the terms of the offer; and on November 25, 1911, the Probate Court entered an order that bids should be invited for the purchase of the bonds to be received on or before December 27, 1911, and that if no better offer was received, the Hinman offer should be accepted. Subsequently, by agreement, the time was extended to January 18, 1912.

On November 25, 1911, after the order of the Probate Court was entered on that date, the executor presented a written demand on the trustee to declare the principal of bonds due in accordance with the provisions of the trust deed, and especially article V, which provided that in case there was a six months' default in the payment of the coupons after due demand "that the trustee * * * may and if thereunto requested in writing, by a holder of a majority in amount of the said bonds outstanding, shall by written notice to the Company declare the principal of all the bonds hereby secured then outstanding to be and the same shall thereupon become immediately due and payable." The Trust Company thereupon advised the attorney of the executor, who presented the demand,

that on account of the proposed absence of its vice-president, the matter could not be given attention until November 28, 1911, and that the attorney of the executor assented. On November 28, 1911, and before the trustee had secured the advice of its counsel as to its duty on the demand of the executor, the Inter Ocean Company paid in full the disputed coupons, the Trust Company delivered up the disputed coupons to the Inter Ocean Company and notified the executor. The executor repudiated the transaction, and claimed that the Trust Company held the coupons solely as custodian and had received the money and parted with the coupons without authority.

On December 4, 1911, the executor having filed in the Probate Court his petition praying that the Trust Company be proceeded against as in contempt of court in violating the custodian's order of March 15, 1906, by reason of its surrender of the disputed coupons, the trustee filed in the Probate Court its petition setting forth the facts and asking the direction of the Probate Court as to whether it should tender back the money so received and demand the return of the disputed coupons. At the hearing, December 29, 1911, the Probate Court declined to enter any order on either petition and continued the matter to January 9, 1912; that the presiding judge then indicated that the Trust Company was not authorized to receive the money and surrender the disputed coupons, and entered an order requiring the Trust Company to deliver the disputed coupons to the executor on or before January 8, 1912, but made no adjudication as to whether the Trust Company was authorized to receive payment and surrender the disputed coupons.

January 2, 1912, the trustee tendered back the money to the Inter Ocean Company and demanded the return of the disputed coupons.

After the executor had served the demand upon the trustee to have the principal of the bonds declared

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due, the trustee informed the Inter Ocean Company of the demand and that said Company then claimed that because of the dealings between the executor and George W. Hinman, who was the president of the Inter Ocean Company, neither the executor nor the trustee had the right to declare the principal of the bonds due and that said Company would be seriously damaged by such acts.

After the entry of the custodian's order of March 15, 1906, the Trust Company had been in the habit, from time to time, of collecting interest coupons and similar securities without an order of court and with the acquiescence of the executor; and the request of the executor to present the disputed coupons for payment March 27, 1911, was made without any order of court, or any claim that an order was necessary, and the authority then given by the executor had never been withdrawn unless the demand of November 25, 1911, amounted to such revocation or withdrawal.

The executor insists the bill avers that it is the duty of the trustee to declare the principal of the bonds due, and proposes, in case the trustee declares the principal of the bonds due, to make public advertisement of the fact to induce persons to bid in the Probate Court for the purchase of said bonds on the theory that the purchaser would thereby secure the right of either having the bonds paid in full or procure the sale of the properties and franchises of the Newspaper Company under the trust deed of January 1, 1907, and thereby he would realize a sum much greater than the Hinman offer, and that the executor threatens to hold the Trust Company liable in heavy damages; that the Inter Ocean Company and Hinman claim that by reason of the negotiations between the executor and Hinman, and the proceedings in the Probate Court, neither the executor nor the Trust Company had the right to declare the principal of the bonds due; and if the Trust Company declared the principal of the

bonds due, the Inter Ocean Company would hold the trustee responsible for heavy damages; that the executor claimed that the Trust Company was without authority to receive payment of the disputed coupons and surrender them; that the Inter Ocean Company claimed that the Trust Company had such authority; that the executor had held out the Trust Company as possessing such a power, and that the payment of the disputed coupons cured the default; that under the mortgage the trustee was entitled to a bond of indemnity, and that the executor had refused to furnish such bond.

The Trust Company, as trustee under the mortgage of January 1, 1907, was in doubt as to its duties and liabilities growing out of the matters set forth in its bill, and, particularly, whether even if the Inter Ocean Company had not tendered payment of the disputed coupons, in view of the proceedings in the Probate Court, and the negotiations between the executor and Hinman and the Inter Ocean Company, the trustee was legally entitled to declare the principal of the bonds due; as to whether the disputed coupons had in fact been paid; whether such payment operated to relieve the default; as to whether under all the circumstances it was the duty of the trustee to declare the principal of the bonds due; that in view of the claims of the respective parties, the Trust Company prayed "that this court may determine whether or not it, as trustee under said mortgage or deed of trust, dated January 1, 1907, is legally entitled to and should declare the principal of the said bonds to be due and payable, and may by its decree direct, advise and aid the complainant as such trustee in that respect, and for other and further relief."

The answer of the executor, Owsley, to the bill of complaint admits the material allegations of the bill of complaint and sets up the executor's rights as he contended them to be, and avers that he filed in the Pro-

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bate Court, on December 4, 1911, his petition to have the Trust Company adjudged guilty of contempt for parting with disputed coupons, and on January 27, 1912, the court found the Trust Company guilty of contempt of court and fined it in the sum of \$200; that he had repudiated the transaction of the Trust Company in receiving the money and parting with the disputed coupons, and insisted that the trustee should perform its duty and declare the principal of the bonds due notwithstanding the wrongful surrender of the disputed coupons. The answer alleges that if the trustee had performed its duty, purchasers would have bid substantially par for bonds, and that by reason of the wrongful failure of the trustee to perform its duty, the Hinman offer was the best price procurable, and alleges that the executor had suffered large damages and had filed his cross-bill of complaint to cover them.

The executor filed a supplemental answer, stating that without prejudice to its rights set up in his answer, and under the cross-bill of complaint, on March 7, 1912, in accordance with the order of the Probate Court of January 19, 1912, the executor had sold to George W. Hinman all of the \$400,000 Inter Ocean bonds with coupons maturing on and after July 1, 1911, and thereafter had no further interest therein, but retained his right and claim to compensation from the Trust Company for damages and to relief and remedy against it for its wrongful act as set forth in its answer and cross-bill, and denies that the Trust Company is entitled to any relief under its bill of complaint.

The joint and several answer of the Inter Ocean Company and George W. Hinman sets up the general facts as they appear in the bill and answer of the executor and sets out at length the correspondence, the orders of the court referred to, and that on January 29, 1912, the executor made a written tender to Hinman of the \$400,000 Inter Ocean bonds with the July

1, 1911, and succeeding coupons, and demanded payment of the sum of \$142,883.58, being the sum of \$175,000 mentioned in the contract of April 1st, and the order of the Probate Court, less \$32,116.42 paid for the disputed coupons, and that Hinman also deliver his note for \$25,000 that subsequently the entire transaction was closed by Hinman paying \$142,883.58 and delivery of his promissory note for \$25,000, and otherwise carrying out the terms of his offer, and by the executor delivering the \$400,000 Inter Ocean bonds with the coupons maturing on and after July 1, 1911, and otherwise complying with the terms of said offer; that the coupons which have since matured have been surrendered to the Inter Ocean Company and cancelled; that the Trust Company has no right to declare the principal of the bonds due; that there are no matured coupons upon or pertaining to said bonds that have not been fully paid and surrendered to the Newspaper Company; that the final order of the Probate Court of January 19, 1912, confirming the *nisi* order of November 25, 1911, is conclusive upon the executor of the estate of Charles T. Yerkes, the Probate Court and all others, and that the executor is now precluded by such order and his acting thereon from raising the question of the payment of the disputed coupons.

The cross-bill filed by the executor against the Central Trust Company sets out substantially the same facts as are set out by the executor in his answer to the original bill, and that it was to the best interests of the Yerkes estate that the demand upon the trustee to declare the principal of the bonds due should not be made until after the court had taken action upon the petition of the executor to have the principal of the bonds declared due in order to secure the best offer for said bonds; that the refusal of the trustee to declare the principal of the bonds due and the delivery of the disputed coupons by the Trust Company cast a cloud upon the title of the executor and prevented the

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executor from advertising that the principal of the bonds had been declared due so that prospective bidders might be informed that they could secure the rights, property and franchises of the Inter Ocean company and the right to publish the "Inter Ocean" through foreclosure proceedings; that had the trustee performed its duty the market value of the bonds would have been worth much more than the amount of the Hinman bid, to wit: substantially the sum of \$400,000, by reason of the fact that the purchasers would have had the right to either have had the principal and interest of the bonds paid in full, or to have the trustee enter and take possession of the property of the Inter Ocean Company and control the publication of the "Inter Ocean," or by foreclosure under the terms of the mortgage to have acquired such property and the right to publish the newspaper; that the failure to receive any bid on said bonds up to and inclusive of January 18, 1912, other than the Hinman offer, was caused by the wrongful acts of the trustee, and especially its failure to declare the principal of the bonds due,—in consequence of which wrongful acts the property in the bonds, which was reasonably worth \$400,000, was sold for \$200,000, and has refused to reimburse the executor, and prays for a decree that the Trust Company committed a breach of duty as trustee and damage to the executor, and for an accounting the payment by the Trust Company of the amount so found to be due the executor.

The answer of the Central Trust Company to the cross-bill sets out the facts substantially as set out in the original bill of complaint; admits the receipt of the demand to declare the principal of the bonds due and its failure to make such declaration, and states that it received from the Inter Ocean Company the amount of the disputed coupons and surrendered the coupons, and alleges that promptly upon payment of said coupons one George M. Maher, who was the rep-

representative of said cross-complainant in all matters relating to said estate, was informed of the payment and the money was tendered to him and that Maher stated that it would be necessary for him to telegraph for instructions. The answer also sets out that under the trust deed it is expressly provided that the defendant should not be answerable or accountable under any circumstances except for bad faith, or gross or wilful negligence, and avers that it has not been guilty of bad faith and has not been guilty of gross or wilful negligence, and denies that the cross-complainant is entitled to relief as prayed for.

Replications were duly filed to the answers, and on January 19, 1912, a stipulation or agreement was entered into between the Central Trust Company, the Inter Ocean Company, Owsley as executor, and Hinman, as to the bill and cross-bill and trial thereon of the Central Trust Company. The agreement recites the receipt by the Central Trust Company of the sum of \$32,116.42 in payment for the disputed coupons; that the executor contends that the Central Trust Company of Illinois was not authorized to receive the money in payment of the coupons and was not authorized to surrender the same, and that the receipt of the money and the surrender of the coupons were, and each of them was, unlawful and improper; and, on the other hand, it has been contended by the Central Trust Company, and by the Inter Ocean Company and each of them that the Central Trust Company was authorized to accept said money in payment of said coupons and to surrender the same and that the acceptance was proper.

The agreement further recites that the executor contends that on November 25, 1911, and thereafter it was the duty of the Central Trust Company, as trustee, to declare the principal of the bonds due, and that it is contended by George W. Hinman and the Inter Ocean Company that it was not the duty of the Central

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Trust Company to declare the principal of the bonds due, and that since the filing of the bill of complaint on January 19, 1912, the Inter Ocean bonds in controversy, together with the coupons due July 1, 1911, and subsequent thereto, were sold to George W. Hinman in accordance with the order entered by the Probate Court on November 25, 1911, and an order confirming the same entered on January 19, 1912, and that the \$32,116.42 theretofore paid to the Central Trust Company of Illinois has been agreed to be turned over to the defendant executor in accordance with the agreement between the parties, which is attached.

To avoid circuitry of action it is agreed that the executor shall answer the bill of complaint and file his cross-bill to have the damages assessed, and that the Central Trust Company shall answer the cross-bill, and the issues raised by said original bill and by said cross-bill, and the answers thereto shall be heard and determined together by this court in the cause, notwithstanding the sale of the bonds to Hinman and the agreement, Exhibit "A" annexed, and the payment made in accordance with said agreement; and, independently of whether or not the court in this cause shall hereafter instruct the said Central Trust Company of Illinois to declare or not declare the principal of the bonds due, as to which the court shall take such action as it may be advised, the court shall, nevertheless, determine whether or not it was, on November 25, 1911, or at any time subsequent thereto, and prior to the date of sale of said bonds to said Hinman, the duty of said Central Trust Company of Illinois to declare the principal of said bonds due, and shall also determine fully the issues raised by said cross-bill and the answer thereto. The agreement further recites that the parties understanding that the appeal from the Probate Court on the contempt proceeding may possibly be determined before the hearing of this

cause, this shall be without prejudice to the executor to claim that such proceedings are *res adjudicata* and without prejudice to the other parties to claim that it is not *res adjudicata* as to any matter or thing involved in the above cause, it being admitted that neither said Hinman nor said Inter Ocean Newspaper Company was or is a party to such contempt proceedings in the Probate Court, and nothing in this stipulation contained shall be construed as a waiver by any party of his or its right to have the decree reviewed upon appeal or writ of error.

MILLER, STARR, PACKARD & PECKHAM, for plaintiff in error; W. ORISON UNDERWOOD and MERRITT STARR, of counsel.

PAM & HURD and JOHN BARTON PAYNE, for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

The final decree of February 13, 1913, finds upon the bill and cross-bill that by reason of the order of November 25, 1911, and the contract of April 1, 1911, and the facts shown in the record, it was not the duty of the trustee to declare the principal of the bonds due; that the demand of the executor interfered with the order of November 25, 1911, and changed the status of the parties; that the executor appointed and treated the Trust Company as his agent to demand and receive payment for the disputed coupons; that the Trust Company had the right to receive payment therefor and surrender the disputed coupons, and that the Trust Company was not bound to comply with the demand of the executor.

Fifty errors are relied upon for a reversal of the decree. Plaintiff in error has presented a brief and argument under sixteen heads with numerous subdi-

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visions in support of the errors assigned. We shall not undertake to pass upon the numerous points and subdivisions specifically, although we have considered them. In the view we take of the case, such a discussion would be unnecessary, for it would involve a discussion of many points which we deem immaterial.

The bill presented a clear case of a trustee confronted by doubt as to its duty in the premises and threatened with damage suits by both parties if it failed to comply with their respective demands. But, whatever equity the bill may have presented as originally filed, all questions as to the jurisdiction of the court in the premises were foreclosed by a stipulation in the case entered into between the parties. That stipulation contained a recital to the following effect: "Whereas, in order to avoid circuitry of action and multiplicity of suits, it is desired by all the parties that the matters in controversy between the parties hereto shall be determined in this proceeding." It was then agreed that the executor should answer the bill and that he should file a cross-bill, setting up his alleged claim for damages, and that "the issues raised by said original bill and by said cross-bill and the answers thereto, shall be heard and determined by this court in the above entitled cause, notwithstanding the sale of said bonds to Hinman and the agreement, Exhibit 'A,' hereto annexed, and the payment made in accordance with said agreement, and, independently of whether or not the court in this cause shall thereafter instruct the Central Trust Company of Illinois to declare or not declare the principal of the bonds due, as to which the court shall take such action as it may be advised (the defendant executor claiming that having sold said bonds, he is no longer interested in the question as to whether or not the principal of said bonds shall thereafter be declared due), said court shall, nevertheless, determine whether or not it was, on November 25, 1911, or at any time subsequent there-

to and prior to the date of the sale of said bonds to said Hinman, the duty of said Central Trust Company of Illinois to declare the principal of said bonds due, and shall also determine fully the issues raised by said cross-bill and the answer thereto." There is a further provision in paragraph five that nothing in the stipulation shall preclude any defenses, with a recital to the effect that it is not intended to cut off defenses, "but simply to provide for the adjudication of such rights, claims, equities and defenses in this proceeding." We think it clear that under such stipulation the court should, in this proceeding, take the very course which the parties had agreed should be taken, namely, determine whether it was the duty of the Trust Company to declare the principal of the bonds due, the whole controversy revolving around that central fact. The stipulation was a clear and distinct waiver of any possible objection which could have been made originally, that there was an adequate remedy at law, and it is well settled that such a defense may be waived.

The contention that a similar proceeding was pending in the Probate Court is equally untenable. The petition which was filed in the Probate Court asked the instructions of that court as to whether the custodian should comply with the demand which the executor made upon it to tender back the money paid on the disputed coupons and demand a return of such coupons, and for such other instructions, if any, as the court might deem appropriate. The petition did not ask instructions of the Probate Court with respect to declaring the principal of the bonds due, but, if it had, the objection of a prior proceeding pending could only have been made by a plea in abatement in the Circuit Court. Not only was this plea not made, but the point was waived by the above stipulation.

We do not think it necessary to enter into a discussion of the construction of the clause in the mort-

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gage with respect to declaring the principal of the bonds due. It may be conceded, for the purposes of this case, that under the clause in question in the mortgage, if default were made in the payment of interest and continued for the period specified therein, and this situation was not affected by any other circumstances, such as the agreements of the parties and the submission of the offer to the Probate Court, it would have been the duty of the Trust Company to have declared the principal of the bonds due. The trustee's duty here, however, was controlled by other circumstances and agreements subsequently entered into.

The executor contends that it was the duty of the trustee to declare the principal of the bonds due immediately upon the receipt of the demand from the executor on November 25, 1911, and the trustee had no discretion in the matter.

The argument in support of this contention is based mainly upon the fifth clause of the mortgage, which provides that the trustee, in case of six months' default, "may, and if thereunto requested in writing by the holders of a majority in amount of the said bonds then outstanding, shall, by written notice to the Trust Company, declare the principal of all the bonds hereby secured then outstanding to be, and the same shall thereupon become, immediately due and payable."

This argument, however, ignores many undisputed facts in the record which, in our opinion, justified the Trust Company in taking time to consider its duties, not only in view of the provisions of the mortgage, but of the situation of the parties. The Hinman offer of March 14th, the contract of April 1st, and the deposit of \$20,000 thereunder by Hinman, the petition filed in the Probate Court on June 8th, and the order of the court thereon of November 25, 1911, fixed a status of the bonds and coupons not provided for in the mortgage. The Probate Court having assumed and exercised jurisdiction over the subject-matter and directed

a sale of the bonds and coupons as they stood, on the application of Owsley, the executor, there was no power or equitable right in the executor to change the status so fixed by demanding that the trustee declare the maturity of the bonds. If the Trust Company had complied with the demand of the executor and declared the bonds due, it would have created an entirely different status of affairs from that established by the Probate Court by its order *nisi* of November 25th. Hinman would have had the right to withdraw his offer and take up his deposit of \$20,000, and the Probate Court would have been compelled to recognize the changed situation and allow the offer and the deposit to be withdrawn. At the time the demand was made upon the trustee, it was acting under the order of the Probate Court entered only a few minutes before, as well as under the prior order by which the bonds and coupons were placed in its custody, and the trustee had no right to change the status of the parties and the condition of the bonds without first submitting the matter to the court. The principles of common honesty and fair dealing with the court and the parties in interest required this. That the executor might have sold the bonds without applying to the Probate Court is immaterial. The executor did apply for an order of sale, and it was entered. After the court, upon the application of the executor, had taken cognizance of the subject-matter of the sale of the bonds, the executor had no right to step out of court and change the subject-matter of the sale without submitting the proposed change to the court. *Quidnick Co. v. Chafee*, 13 R. I. 367; *Knott v. People*, 83 Ill. 532; *Ex Parte Kellogg* (Cal.) 30 Pac. 1030; *Merrimack River Sav. Bank v. City of Clay Center*, 219 U. S. 527. We think the contention that it was the duty of the Trust Company to declare the bonds due on the demand of the executor made upon it a few minutes after the entry of the order of November 25, 1911, is untenable, when

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considered from the point of view of the rights and obligations of the parties arising out of the agreement of April 1, 1911, and the subsequent proceedings in the Probate Court.

A consideration of the situation which the trustee occupied under the mortgage, and the duties which it owed to the maker of the mortgage and the holder of the bonds secured thereby, in connection with the subsequent relations created by the parties above adverted to, leads us to the same conclusion. A trustee in a trust deed given to secure the payment of money is the agent of both parties thereto, and is bound to act fairly and justly towards the debtor as well as towards the creditor. If the instructions or demands of one party require him to do an illegal or immoral act, he may violate such instructions with impunity. Story on Agency, sec. 195; *Ventres v. Cobb*, 105 Ill. 33; *Williamson v. Stone*, 128 Ill. 129. Furthermore, the written instruments and the evidence in the case establish beyond any reasonable doubt that the *status quo* was to be preserved by the parties until the Hinman offer was submitted to and passed upon by the Probate Court. Hinman offered to buy the bonds; the executor agreed to submit the offer to the Probate Court, and if the Probate Court approved the sale, Hinman should have the bonds, unless a better offer was made, and that the bonds in character and condition should remain unchanged until that matter was finally passed upon by the Probate Court; and to that end no attempt should be made to collect interest or rent or to declare the principal of the bonds due. This was the spirit of the agreements and actions of the parties up to the time the demand was made by the executor. The demand was in violation of the agreements, and was an act of bad faith on the part of the executor. On the other hand, when the demand was made to declare the bonds due, Dawes and Abbott of

the Trust Company took the matter under advisement until the following Tuesday. Hinman and the Inter Ocean Company paid the coupons. We think that there is no real foundation in the evidence, considering the relations of the parties, for reflection upon the conduct of Dawes and Abbott in taking the matter of the demand under advisement, and the conduct and action of the Trust Company is not justly subject to censure or judicial criticism.

It is urged on behalf of plaintiff in error that the receipt by the Trust Company of \$32,116.42 and the surrender of the disputed coupons was not a payment thereof and did not relieve the trustee of its duty under the mortgage to declare the principal of the bonds due.

We cannot assent to this proposition. The question as to the authority of the Central Trust Company to deliver the disputed coupons does not affect this question. If the payment was a good payment, it relieved the default, whether the coupons were delivered or not. *Dwen v. Blake*, 44 Ill. 135. The coupons were due and the Inter Ocean Company had a right to pay them when the payment was made. The executor was out of the State when the payment was made. The bonds and coupons in question were legally and actually in the possession of the Trust Company, placed there by Owsley, as executor, under the order of the Probate Court. If the executor had the right to collect the coupons, such right must necessarily be exercised through the Trust Company which held the physical possession of them, for the debtor, Inter Ocean Publishing Company, had the corresponding right to the possession of the coupons when it paid them. If then the executor had the right to demand or request the Trust Company to demand payment of the coupons for any legitimate purpose and exercised that right, such request and demand carried with it the authority

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from the executor to deliver the coupons if the debtor responded to the demand of the Trust Company and made payment before a forfeiture was declared for nonpayment. This demand and authority was never withdrawn. Hence, the executor cannot complain if the Trust Company received the money and delivered the coupons when they were paid by the Inter Ocean Publishing Company. The essence of the complaint of the executor, therefore, cannot be the receipt of the money or the delivery of the coupons when they were paid, but it is that the Trust Company failed to declare the bonds due for default in the prompt payment of the coupons after the demand for payment was made. Furthermore, the evidence shows that it had been the practice of Owsley, as executor, to collect such obligations as notes and maturing coupons through the Central Trust Company as his agent; and, as far as the Inter Ocean Company was concerned, the facts were that on the only occasion when formal demand was made for the payment of the coupons, such coupons were presented by the Central Trust Company, and that on the only occasion when the Inter Ocean Company was notified that a demand would be made, in June, 1909, the request was that the coupons be presented by the Central Trust Company. From all the facts shown in the evidence, our conclusion is that the payment of the coupons to the Trust Company was a valid and legal payment. *Southworth v. Smith*, 7 Cush. (Mass.) 391; *Hale v. Patton*, 60 N. Y. 233; *Ebert v. Arends*, 190 Ill. 221; *Zempel v. Hughes*, 235 Ill. 424.

If the payment of the money to the Central Trust Company, under the facts shown by the evidence, was not a legal payment of the coupons, it was a sufficient tender in equity to relieve against the forfeiture under the authorities cited above.

On January 18, 1912, no bids having been received for the bonds better than the Hinman offer, the Probate Court so found and ordered the bonds sold to

Hinman, the bonds to be delivered without the disputed coupons, and the price to be reduced by the amount which had been previously paid to the Central Trust Company. In the meantime an agreement had been entered into between all parties covering the payment of \$32,116.42 for the disputed coupons to the executor, and providing for the filing of a cross-bill in the case, and that the bill and cross-bill should be heard and considered together. The bonds were accordingly sold and delivered to Hinman, and the full purchase price thereof has been paid, and all conditions and provisions of the offer of March 14, 1911, the deposit agreement of April 1, 1911, the *nisi* order of November 25, 1911, and subsequent orders of the Probate Court with reference to the sale of the bonds, have been complied with. In substance, therefore, this litigation is reduced to a suit by the executor against the Central Trust Company for \$200,000 damages for not declaring the principal of the bonds due because of the failure of the Inter Ocean Company to pay the interest coupons after demand made. It follows from the conclusion we have reached, as stated above, that the Trust Company did not violate its duty in not declaring the principal of the bonds due, or in wrongfully parting with the coupons, when it received the payment of \$32,116.42 therefor, and that the executor has no right of action for damages against the Trust Company. It is, therefore, unnecessary for us to consider and pass upon the competency of the proffered evidence on the question of damages.

We find no substantial error in the decree, and it is, therefore, affirmed.

Affirmed.

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**In the Matter of the Estate of Charles T. Yerkes,
Deceased.**

**Louis S. Owsley, Executor, Plaintiff in Error, v. Cen-
tral Trust Company, of Illinois, Defendant in Error.
Gen. No. 19,528.**

1. CONTEMPT, § 18*—*when custodian not liable for delivery of bond coupons to debtor without authority from court.* Where a trust company was appointed by the Probate Court as custodian of certain bonds and securities belonging to an estate, and the order of the court provided that the bonds and securities deposited with the company should not be withdrawn from its custody except by an order of the court, *held* that the company could not be fined for contempt of court because it did not obtain authority from the court to deliver bond coupons to the debtor when it received interest on the bonds, where it appeared that the executor of the estate and the company construed the order as not requiring any authority for delivery of a paid security and that there had previously been numerous like deliveries without an order of the court and with the consent and acquiescence of the parties.

2. CONTEMPT, § 74*—*when appeal lies to the Circuit Court.* An appeal from an order of the Probate Court adjudging a custodian of bonds and securities of an estate guilty of contempt, imposing a fine and directing an execution to issue therefor in favor of the executor if not paid within a certain time, properly lies to the Circuit Court.

GRIDLEY, J., not being a member of this court when this case was decided, took no part in its consideration.

Error to the Circuit Court of Cook County; the Hon. H. STERLING POMEROY, J., presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 6, 1914.

MILLER, STARR, PACKARD & PECKHAM, for plaintiff in error; W. ORISON UNDERWOOD and MERRITT STARR, of counsel.

PAM & HURD and JOHN BARTON PAYNE, for defend-
ant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE SMITH delivered the opinion of the court.

This writ of error is prosecuted to reverse the decree of the Circuit Court, finding the issues for the respondent and dismissing the petition of Louis S. Owsley, as executor of the estate of Charles T. Yerkes, deceased, for contempt against the respondent, Central Trust Company of Illinois.

The case was pending in the Circuit Court on appeal from an order entered on the petition and answer thereto, in the Probate Court of Cook county, fining the Trust Company for contempt in the amount of \$200, and directing that sum to be paid to Louis S. Owsley, as executor, and ordering an execution to issue therefor in favor of Owsley, executor, against the Trust Company if the fine was not paid within ten days.

From the petition, answer and evidence in the record, it appears that the Central Trust Company of Illinois was, by order of the Probate Court of Cook county, Illinois, appointed custodian of certain securities and funds of the estate of Charles T. Yerkes, deceased. The order of appointment is as follows:

“It is ordered that Louis S. Owsley, to whom letters testamentary have this day been issued under the last will and testament of Charles T. Yerkes, deceased, be and is hereby directed to deposit in the Central Trust Company of Illinois; all stocks, bonds and other securities coming into his possession as such executor; also all cash that may come into his possession as executor as aforesaid.

It is further ordered that no such bonds, stocks or securities so deposited with the Central Trust Company of Illinois shall be drawn therefrom except by an order of this court and that no such cash so to be deposited shall be drawn from said Central Trust Company of Illinois except upon the order of this court or upon vouchers to be approved by said Central Trust Company of Illinois.”

The Trust Company had in its possession under this order \$400,000 par value of bonds of the Inter Ocean

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Newspaper Company, secured by a mortgage in which the Trust Company was trustee, together with the coupons for interest thereon. The coupons, which matured on these bonds on July 1, 1909, were in the possession of the Trust Company; and, pursuant to verbal instructions from Louis S. Owsley, executor of the estate, the Trust Company presented these coupons, on July 1, 1910, and collected from the Inter Ocean Newspaper Company the amount due thereon, \$10,000, and delivered up the coupons and credited the executor's account with the payment, and no order of the Probate Court was entered authorizing the delivery of the coupons.

On March 27, 1911, the Trust Company, upon the request of the executor, presented for payment three sets of coupons (which are the coupons involved in this controversy) to the Inter Ocean Company for payment, and payment was refused. No order of the Probate Court authorizing such presentation was ever entered. On November 25, 1911, the executor made a demand upon the Trust Company, as trustee under the mortgage securing the bonds to which these coupons appertained, to declare the principal of the bonds due. This was regarded by Dawes, president of the Trust Company, as a violation of the agreement then existing between the executor, Hinman and the Inter Ocean Company, and of the order of the Probate Court entered with respect to such agreement; but he stated that he would perform his duty in the premises, whatever it might be, stating, however, that he proposed to take advice as to just what that duty was. He thereupon notified Hinman, president of the Inter Ocean Company, of the demand. Three days later, on November 28, 1911, the Inter Ocean Company tendered payment to the Trust Company of these coupons, which it accepted and delivered to the Inter Ocean Company the coupons in question.

The situation existing at this time was that George W. Hinman, president of the Inter Ocean Company, who already owned most of its stock, and had sold to the public \$200,000 par value of its bonds, a part of the above mentioned issue, had made an offer to purchase the bonds held by the executor and deposited with the Trust Company under an agreement for that purpose, \$20,000 in cash. The executor had reported the offer to the Probate Court, which, on November 25, 1911, entered an order directing the sale of the bonds to Hinman in accordance with his offer unless by a day fixed the executor should receive a better bid, and further directing the executor to advertise for bids, which were to be returned into open court on the day so fixed. Immediately after the entry of this order, demand was made by Owsley on the Central Trust Company, as trustee, to declare the principal of the bonds due.

The executor, contending that the action of the Trust Company in delivering up the coupons was in violation of the order appointing it as custodian, above quoted, filed a petition seeking to have it punished for contempt of court. To this petition the Central Trust Company filed an answer. The Probate Court entered an order December 30, 1911, which required the custodian to deliver up the coupons on January 8, 1912. This order was treated by all parties, in effect, as a rule to show cause, and the Trust Company filed its answer on January 8, 1912, setting up the circumstances under which it delivered the coupons, and contending that no order was required for delivery of a paid obligation, and that in the past numerous like deliveries had been made without any order of court, and with the consent and acquiescence of the executor. The Probate Court thereupon entered the above order, finding the Central Trust Company guilty of contempt. The order was based upon the original petition for contempt and the answer thereto, and also recited the order of December 30, 1911, and the answer to such

order. From that order an appeal was prayed to the Circuit Court and the case was there tried *de novo*.

It appeared on the trial in the Circuit Court that a large number of coupons and similar obligations had been collected by the Trust Company from time to time, and the coupons surrendered without any order of the Probate Court in the premises, and it was admitted on the hearing that in each instance the executor, Owsley, had directed the Trust Company to collect the coupons and deliver the same when paid. It also appeared that the Trust Company, at the request of the executor, had sold \$100,000 par value of bonds held by the Trust Company as custodian; that no order of the Probate Court was ever entered authorizing such sale or the delivery of the bonds sold, and that such action had been reported to the Probate Court more than two years before and no action had ever been taken by the Probate Court in anyway objecting thereto.

While the amount of collections made by the estate appear to have been large, most of the assets were held as collateral security to obligations of the estate, and, of course, were not in possession of the custodian. The executor admitted that he could not recall a single case where an obligation was paid any order of court was ever procured for the delivery of the paid obligation.

It further appears that the executor had filed a complete statement of his receipts and expenditures from April 30, 1910, down to and including November 2, 1910, and that he had previously filed accounts covering receipts and expenditures prior to that time. These accounts showed the various items which were collected and delivered without any order of court, including the \$10,000 collected July 1, 1910, on the Inter Ocean Company coupons. There is no evidence in the record tending to show that the slightest objection was ever made by the court or the executor to delivery of

these coupons without an order of the Probate Court. Prior to the trial of the case in the Circuit Court, the executor made a motion to dismiss the appeal upon the ground that the matter could not be reviewed by appeal in the Circuit Court on a trial *de novo*, but that the case should have been taken by a writ of error to the Appellate Court, or to the Supreme Court of the State. We hold that, under the statute on this subject, the appeal was properly taken to the Circuit Court and the court did not err in denying the motion to dismiss the appeal. The statute (paragraph 3269, Jones & Addington's Statutes) is as follows:

“Appeals may be taken from the final orders, judgments and decrees of the probate courts to the circuit courts of their respective counties in all matters except in proceedings on the application of executors, administrators, guardians and conservators for the sale of real estate, upon the appellant giving bond and security in such amount and upon such condition as the court shall approve, and upon such appeal the case shall be tried *de novo*.”

This statute gives the right of appeal in all matters other than the specifically excepted cases, and it must be conceded that the present case is not one of the excepted cases. See also *Randolph v. People*, 130 Ill. 533. The order here was, as in the *Randolph* case, an order to pay a specific sum of money within ten days, in default whereof execution should issue. An appeal was taken in that case to the Circuit Court which dismissed the appeal upon the ground that it did not lie in such a case. The Supreme Court held this was error; that the appeal was properly taken to the Circuit Court. The distinction between civil and criminal contempt in this State is elaborately discussed in *People v. Diedrich*, 141 Ill. 665; *O'Brien v. People*, 216 Ill. 354; *Franklin Union No. 4 v. People*, 220 Ill. 355; *Flannery v. People*, 225 Ill. 62; *Hake v. People*, 230 Ill. 174. Under the rulings in those cases, the pro-

ceeding in the case under review was a civil contempt, and it seems to be clear from the above cited authorities that the course of procedure, both in the lower courts and in all reviewing courts, is in accordance with that pursued in any other civil proceeding, and the appeal was properly taken to the Circuit Court. The trial in the Circuit Court is, by statute, a trial *de novo*. The Circuit Court does not sit in review of the Probate Court. The record shows, we think, that the executor and the custodian at all times construed the order appointing the custodian as not requiring any authority from the court to receive payment of a security and to deliver the security paid. The court adopted the same construction for the various payments so made and reported to the court in the executor's accounts and the court, at no time, dissented therefrom. Moreover, in the only case in which the attention of the court was called to the fact that securities were delivered without an order of the court, which was a sale and not a payment, no action whatever was taken by the court either against the executor or the custodian. Parties and courts are bound by the construction which they place upon their orders, and after the party complained of has acted in reliance upon that construction, they cannot, at least in a summary contempt proceeding, repudiate such construction. We think the order should not be construed as preventing acts which would not injure the estate but would benefit it. The coupons were delivered by the custodian in accepting payment thereof, which the debtor had a right to make. The coupons being in the possession of the respondent and the respondent having demanded payment thereof, the debtor, for his own protection, had the right to pay them. He had, at the same time, the corresponding right to demand the coupons when they were paid. The executor having placed the construction on the order, which the record shows he did, and the parties having acted upon such

construction, the executor should not now be heard to contend that there is a different construction and invoke the extraordinary remedy of contempt proceedings against the custodian.

The trial court held, and we think correctly, that the order appointing the custodian was modified by a tacit agreement between the executor and the custodian, particularly in this case where the coupons were delivered to the debtor on the payment thereof by it in the ordinary course of business in handling such obligations, and where no loss or injury resulted to the estate. The practice pursued in numerous other cases by the executor and the custodian indicates clearly that although there was no written agreement on the subject, there was a tacit agreement between the executor and the custodian that no order of court need be required to deliver an obligation when it was paid. The executor seeks to have the custodian punished, not for the violation of a court decree, but for the violation of a decree as modified by what was virtually a private agreement between himself and the custodian.

In *Encyclopaedia Britannica Co. v. Werner Co.*, 172 Fed. 1012, an injunction was issued, but there were agreements entered into between the parties materially modifying the provisions of the injunction, and the Britannica Company, as the court held, virtually asked the court to punish the Werner Company and its officers, not for their disobedience of the decree as it was pronounced by the court, but for their failure to observe the decree in the manner privately agreed on by the parties to the suit, and held that the jurisdiction to impose a fine on a violator of a decree of injunction should not be exercised in such a case. See also *Holbrook v. Ford*, 153 Ill. 633.

As to the right of the Inter Ocean Company to pay or tender payment of the disputed coupons after demand made by the trustee, we entertain no doubt. In *Central Trust Co. of Illinois v. Owsley*, No. 19,527,

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ante, p. 505, we have held, on the same state of facts, in our opinion filed at this term, that the Inter Ocean Company had the right to tender payment and to pay the coupons to the Trust Company. We will not enter into a discussion of that question further than to say that when the coupons were first presented for payment, the executor clearly constituted the Trust Company his agent to receive payment. It was also the agent which received payment of the next preceding set of coupons. The executor was not in the State on November 28, 1911, and the Inter Ocean Company naturally assumed, and had a right to assume, that the Trust Company, which had the actual possession of the coupons, was the agent of the executor for the purpose of receiving payment of such coupons; and the Trust Company naturally, under the circumstances, assumed that it had authority to receive the money and deliver the coupons upon which it had demanded payment at the request of the executor and on his behalf. If the payment made to the Trust Company was an authorized payment, it is clear the delivery of the coupons was a wholly innocuous act, for, being paid, the papers were valueless, except as evidence of payment. If the payment of the money to the trustee was not a payment of the coupons, it was in equity a good tender, and until withdrawn it remained a good tender, thus cutting off any power or right of proceedings on the part of the executor or trustee based on the maturity of the coupons and nonpayment thereof. Whatever wrong was done and whatever injury was caused, it was not done or caused by the delivery of the coupons (which is the only thing claimed to be contemptuous), but by the receipt of payment and the refusal to mature the principal of the bonds, neither of which could under any circumstances constitute contempt.

The decree of the Circuit Court is affirmed.

Affirmed.

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MR. JUSTICE GRIDLEY, not being a member of this court when this case was decided, took no part in its consideration.

**Citizens Bank of Tifton, Appellant, v. Adam Schillo
Lumber Company, Appellee.**

Gen. No. 19,741.

1. SALES, § 320*—*when buyer not entitled to recoup for freight paid.* In an action to recover the purchase price of a shipment of lumber, where by the terms of the contract the lumber was to be shipped to the buyer, *held* that defendant was not entitled to recoup for freight paid where there was nothing said in the order as to the payment thereof.

2. SALES, § 329*—*when evidence insufficient to allow recoupment of damages for breach of contract.* In an action for the purchase price of several shipments of lumber, *held* error to allow defendant to recoup damages for breach of the contract in not delivering the balance of the shipments contracted for, where no proof was made of the market value thereof at the time of the breach, or the amount of the lumber which defendant was entitled to have shipped.

3. SALES, § 376*—*measure of damages for failure to deliver.* The true measure of damages for failure to deliver lumber or any commodity in accordance with the terms of the contract is the difference between the contract price at the time of the breach and the market price, taking into consideration the quantities contracted for.

4. SALES, § 124*—*when reasonable time for delivery presumed.* Where a contract for a shipment of lumber does not specify the time when the shipment is to be made, or the time for delivery, there is a legal presumption that the lumber was to be delivered within a reasonable time, and parol evidence is inadmissible to controvert the presumption.

5. SALES, § 59*—*when contract of sale severable.* A written order for lumber specifying the number of cars, the character of the lumber to be loaded therein and the prices to be paid therefor,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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held to constitute a severable contract so that a separate cause of action would arise on the invoice of each shipment delivered to the purchaser.

6. ASSIGNMENTS, § 29*—*when not affected by equities arising between original parties.* The liability on assigned invoices for lumber sold is not affected by any equities arising between the assignor and shipper after notice of the assignment.

Appeal from the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed October 6, 1914.

ADAMS, CREWS, BOBB & WESCOTT, for appellant; E. C. TOURJE, of counsel.

ARNOLD TRIPP, for appellee; JAMES W. BREEN, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

On May 9, 15, 20 and 26, 1911, the Atlantic Lumber Company of Tifton, Georgia, consigned and invoiced to the appellee, Adam Schillo Lumber Company, defendant, six carloads of lumber. The various invoices were, upon consignment, assigned to the Citizens Bank of Tifton, appellant, plaintiff below. Five of the assigned invoices were in the form of orders on the defendant to pay the account to the order of the plaintiff. The other assignment was by express assignment in writing to the plaintiff. On receipt of the invoices by the defendant, the same were acknowledged as shown by letters to plaintiff offered in evidence.

After demand for payment and refusal, this suit was instituted in the Municipal Court, predicated upon these invoices and the assignments thereof. As a defense to the action, the defendant alleged that the invoices sued upon covered lumber shipped by the plaintiff's assignor under a contract providing for delivery

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

to the defendant of sixty-four carloads of lumber, which contract, before the compliance with the terms thereof, was abandoned by the Atlantic Lumber Company; and that the failure on the part of the plaintiff's assignor to comply with its contract damaged the defendant to the extent of \$728, for which sum the defendant claimed the right to recoup as against the plaintiff, which sum, together with the amount paid by the defendant for freight and a small allowance for "shorts" and "rejects," deducted from the amount claimed by the plaintiff, left a balance due to the plaintiff of \$307.18, which the defendant signified its willingness to pay.

The order alleged by the defendant to have been given to the Atlantic Lumber Company for the delivery to it of the sixty-four cars of lumber was introduced at the hearing and was received in evidence.

On the trial the plaintiff agreed to allow the amount claimed by the defendant for "shorts" and "rejects" on the lumber covered by the invoices sued on. A jury was waived and the cause was tried before the court. On the trial the court was asked to hold that the memorandum of sale, being defendant's Exhibit 1, as treated by the parties, constitutes a severable contract. This holding was refused by the court. The order of the defendant was dated March 9, 1911, on the Atlantic Lumber Company, to ship to the defendant by the C., M. & St. P. Ry. Co., sixty-four cars of lumber, as follows:

"2 cars	2 x 4	#1—14'	Sissie	\$18.00	
5 "	2 x 4	"—16'	"	18.50	
2 "	2 x 4	"—18'	"	19.00	
2 "	2 x 4	"—20'	"	19.00	
2 "	2 x 6	"—12'	"	17.00	* * *

and so on, specifying the number of cars and the prices to be paid therefor. This order was accepted by the Atlantic Lumber Company. The order did not specify the time when the shipments were to be made or the time for delivery. In the absence of such time being

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fixed, the law will raise the presumption that the lumber was to be delivered within a reasonable time, and parol evidence to controvert this legal presumption is inadmissible. *Union Spec. Sew. Mach. Co. v. Lockwood*, 110 Ill. App. 387; *Driver v. Ford*, 90 Ill. 595. The written order contains all the elements of a contract and was a contract in writing. One of the vital questions in the case is whether or not the contract of sale is severable. In *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, the Court quotes from Parsons on Contracts with approval, as follows:

“If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable.”

In *Keeler v. Clifford*, 165 Ill. 544, the Court said:

“The question, whether a contract is entire or severable, cannot be determined by any precise rule, but must depend upon the intention of the parties, which in each case is ascertained from the language employed, and the subject matter of the contract. ‘If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. And the same rule holds, where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire.’ ”

Under the above cited authorities, the trial court erred in refusing to hold that the contract in question was a severable contract. The trial court also refused to hold that the memorandum of sale, defendant’s Exhibit 1, constitutes of itself a contract. This ruling of the court was erroneous.

It follows from what we have said in regard to the contract that each shipment thereunder gave rise to a

separate and distinct cause of action. Each shipment created of itself a contract or chose in action, and was the subject of an assignment. *Rothschild Bros. v. Wise*, 81 Ill. App. 95. In Mechem on the Law of Sales, vol. 2, sec. 1163, the author says:

“If, under this rule (rule laid down by Parsons) the contract is severable, the seller may recover, in any event for the part delivered, leaving the other to his remedy by recoupment or action for the damages sustained by non-delivery of the residue.”

And in section 1164, the same author says:

“The rule stated by Mr. Parsons is simply a recognition of the fact that there may be contracts in which ‘although the agreement is entire, the performance is severable,’ or, as it has been otherwise expressed, that there may be a contract which may be ‘one and entire in its origin, and yet, looking to the performance of different things at different times, it may be severable in its operation.’ ”

The six invoices sued upon in this case are each an independent cause of action. The invoices were received by the defendant and acknowledgment was made by the defendant of the receipt of the lumber to the plaintiff, stating that it would pay the amount direct to the Citizens Bank of Tifton. The several shipments shown by the invoices became wholly executed on delivery thereof to the carrier designated in the order, by the Atlantic Lumber Company, and upon the invoices being assigned, they constituted separate causes of action for the amount of each shipment. Each invoice and the acceptance by the defendant of the lumber became a separate and severable contract which gave rise to a separate cause of action. The liability of the defendant for the purchase price of the lumber became absolute upon the delivery thereof, as above stated, and the liability therefor was not affected by any equities arising between the assignor and the defendant subsequent to notice by the assignee of the

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several assignments. Under the Statute (chapter 110, sec. 18, Hurd's R. S. 1911, J. & A. ¶ 8555), the invoices were not subject to any equities arising after notice of the assignment. *Chicago Title & Trust Co. v. Smith* 158 Ill. 417; *Pearson v. Luecht*, 199 Ill. 475. The record does not disclose that any default existed upon the original contract on the part of the Atlantic Lumber Company at the time the assignments in question were made, nor at the time the notice of assignment was given to the defendant; on the contrary, the defendant, upon the receipt of notice of the assignment, promised that it would pay the plaintiff direct. It appears that the six consignments sued upon were shipped and received by the defendant; under the contract, a total of twelve cars had been received. As to whether the remaining six cars were received before or after the receipt of the cars sued on is not shown. If it be assumed that the remaining six cars were received later than the six cars in question, it constitutes a complete answer to any question that may be made as to default prior to the notices of assignments in question. If the remaining six cars, on the other hand, were received prior to the cars in question, that would not determine in any manner the question of default except in plaintiff's favor, as an acceptance of these six cars would be itself a waiver of the default. But it is sufficient to say that the record is entirely barren of any evidence of default at the time notices of assignments were given to defendant.

The theory on which the defendant bases its right to recoup against the plaintiff is the failure of the plaintiff's assignor to ship more than twelve cars of lumber. There is no question made in the record but that the Atlantic Lumber Company failed to comply with its contract to ship thereunder the balance of fifty-two cars of lumber to the defendant. Failure, however, on the part of the Atlantic Lumber Company to ship the balance of the cars of lumber could not

give rise to a right of recoupment on the part of defendant against the six invoices in question; for it does not appear in the record that this failure occurred before the consignments in question and notices of the assignments thereof to the plaintiff were given, and even if it did occur before such notices were given, the acceptance of the lumber by the defendant and the promises by the defendant to the plaintiff to pay for the lumber waived any right to recoup for the failure of the Atlantic Lumber Company in the shipment of fifty-two cars of lumber, for the reason given above. But, a further answer to the contention of the right to recoup in this case is based upon the evidence offered on behalf of the defendant. There is no evidence in the record establishing defendant's claim that it was damaged to the extent of the sum of \$728. No proof was made of the market value of the lumber. Proof was made that the defendant paid \$1 more per thousand than the contract called for. That was incompetent evidence and did not tend to prove damages. The true measure of damages for failure to deliver lumber, or any other commodity, in accordance with the terms of a contract, is the difference between the contract price at the time of the breach and the market price, taking into consideration the quantities contracted for. No proof was made in this case of the market value at the time of the alleged breach, or of the amount of lumber which the defendant was entitled to have shipped. It was error to allow, as against the claims sued on, the \$728, for there was no foundation for such allowance in the evidence. It was also error to allow payments of freight to be recouped or deducted. By the terms of the contract, the lumber was to be shipped at Sparks, Georgia, to the defendant at Chicago. When the Atlantic Lumber Company delivered the lumber to the C., M. & St. P. Ry. Co., it was delivered to the defendant. Nothing is said in the order as to the payment of freight. *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.*, 54 Neb.

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321; *City of Carthage v. Duvall*, 202 Ill. 234; *Lake Shore & M. S. Ry Co. v. National Live Stock Bank*, 178 Ill. 506. It follows from what we have said that the court erred in admitting parol evidence of the contract. The conversations between the parties, before the order was reduced to writing, were merged in the order, and it became a complete contract in writing.

Other errors based upon the refusal to hold propositions of law presented by the plaintiff were committed by the trial court, but we think it unnecessary, in view of what we have said, to discuss them in detail.

The judgment is reversed and the cause is remanded for a new trial.

Reversed and remanded.

**In the matter of the Estate of Matthaus Hempfling,
Deceased.**

**Andrew Hempfling, Executor, Appellee, v. Emily
Hempfling et al., Appellants.**

Gen. No. 19,786. (Not to be reported in full.)

Appeal from the Probate Court of Cook county; the Hon. CHARLES S. CUTTING, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 6, 1914.

Statement of the Case.

Petition by Andrew Hempfling, executor of the last will and testament of Matthaus Hempfling, deceased, for an order to sell real estate to pay debts and the widow's award. From an order entered granting the prayer of the petition, Emily Hempfling and others appeal.

The following are the provisions of the will involved:

“First—That after all my just debts and funeral expenses are paid,—

I give, devise and bequeath to my wife, Emily Hempfling, my 'Real estate' and 'Bakery Business' at number 1701 West Erie street, in the city of Chicago and County of Cook and State of Illinois. Providing that said Emily Hempfling should get married again, or in the event of the death of said Emily Hempfling, my wife, the above mentioned real estate and bakery business shall be held in trust for my two children, Andrew Hempfling also Helen Hempfling, minors, who reside with my wife, Emily Hempfling, at number 1701 West Erie street, in the city of Chicago, County of Cook and State of Illinois, until they shall become of age, each to have share and share alike.

Second—I bequeath to my sister, Barbara Hempfling, residing in the city of Statsteinak, Bavaria, Europe, the sum of Five Hundred Dollars.

Third—I bequeath to the Catholic Church at the town of Hohenberg, Germany, the sum of Five Hundred Dollars.

Fourth—I bequeath to Alexian Brothers of Chicago, in the city of Chicago and County of Cook and State of Illinois, the sum of Five Hundred Dollars.

Fifth—I have set aside Five Hundred Dollars for all expenses incurred in my last illness and death, the same moneys as I have bequeathed above is deposited in the First National Bank, making a total of Two Thousand Dollars, and the said First National Bank is located at the northwest corner of Dearborn and Monroe streets in the city of Chicago and the State of Illinois.''

ARNOLD TRIPP, for appellant Emily Hempfling.

MANCHA BRUGGEMEYER, for appellee Andrew Hempfling.

FREDERICK MAYER, for appellee Catholic Church at Town of Hohenberg, Germany.

MR. JUSTICE SMITH delivered the opinion of the court.

Lewis v. Harris Trust & Savings Bank, 188 Ill. App. 544.

Abstract of the Decision.

1. EXECUTORS AND ADMINISTRATORS, § 379*—*when personal property not primary fund for payment of debts.* Ordinarily, personal property is the primary fund for the payment of debts and general legacies, unless a contrary intention appears in the will; but where from the whole will it appears by express language or necessary implication that a particular portion of the estate is to be the primary fund for the payment of debts, the remainder of the estate will be exonerated from the burden.

2. WILLS, § 489*—*when construed as charging real estate with payment of debts.* Where a will reads, "That after all my just debts and funeral expenses are paid, I give, devise and bequeath to my wife," certain real estate, and there are clauses following which dispose of all the testator's money in a bank, *held* it was clearly the intention of the testator to charge his real estate with the payment of debts, and that the Probate Court had power to order a sale of the realty to pay the debts and widow's awards though the personal estate was sufficient to pay the same.

Samuel Arion Lewis, Appellant, v. Harris Trust & Savings Bank and Paul W. Chapman, Appellees.

Gen. No. 19,843.

1. CONTRACTS, § 144*—*when not void as against public policy.* A contract employing a person to go to a city and deliver public addresses and to advocate before city improvement associations the desirability of the city voting a bond issue bearing a sufficient rate of interest to make the bonds salable to carry out the purpose of the city water board to purchase a water plant, the object of the employment being to enable and help his principal to purchase such bond issue or such portion thereof as could be obtained in case they were issued, *held* not void as against public policy.

2. CONTRACTS, § 144*—*when not void as against public policy.* Where a contract is made by an agent to address himself to property owners on a subject in which the principal who employs the agent is interested for gain, when the property owners' consent is necessary to the action of an official representative body, and when it does not appear that the contract contemplates the exercise of personal solicitation or personal influence, or the acting by the agent in a secret manner, require any services at all with the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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official representative body, but on the other hand, the services are to be performed openly and publicly, and without the use of money, such a contract is good and valid and not against public policy.

3. **CONTRACTS, § 136***—*determination of public policy of State.* The public policy of a State is to be found in its constitution and statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of its government officials.

4. **MUNICIPAL COURT OF CHICAGO, § 13***—*presumption on motion to strike statement of claim.* In an action in the Municipal Court based on a written contract, where it cannot be presumed from the contract as set out in the statement of claim that it is illegal, on a motion to strike the statement of claim from the files the contract will be presumed legal, and it is for the defendant to make its illegality apparent.

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed October 6, 1914.

WARWICK A. SHAW and LEWIS C. BALL, for appellant.

THEODORE CHAPMAN and CHARLES LEROY BROWN, for appellees.

MR. JUSTICE SMITH delivered the opinion of the court.

By this appeal the appellant, plaintiff below, seeks to reverse a judgment of the Municipal Court, striking the plaintiff's second amended statement of claim from the files and entering judgment in favor of the defendants and against the plaintiff.

By the rules of the Municipal Court of Chicago, the statement of claim in first-class cases shall be filed in place of regular pleadings. The action was in assumpsit for the value of services which the plaintiff alleged were performed by him on behalf of the defendants under an oral contract. The motion to strike was in the nature of a demurrer to the plaintiff's sec-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative, Quarterly, same topic and section number.

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ond amended statement of claim, and plaintiff objected to the granting of the motion, and stood by his amended statement of claim. The question thus presented is whether the second amended statement of claim presents a good cause of action.

The questions presented and discussed by counsel in their printed and oral arguments is whether the agreement set forth in the second amended statement of claim is or is not contrary to public policy and void. No other question on the validity of the alleged contract, save that of public policy, could be raised legally, we think, for the reason that the plaintiff relies in his statement of claim upon a *quantum meruit* for the value of his services accepted by the defendants. At all events, counsel on both sides agree that the public policy question is the only question presented by the record, and that the statements of claim were stricken on the ground that the agreement set out was such a contract as the courts will refuse to enforce.

It appears from the statement of claim that the Omaha Water Company owned a water plant furnishing water to the city of Omaha which it did not desire to sell; that there was a "water board," a body of public officials, which had in view the purchase of the water plant and had voted a bond issue of \$6,500,000, bearing interest at four per cent., payable in thirty years, on which to raise the money necessary for the purchase of the plant; and this issue of bonds had been approved by the people of Omaha, when the contract in question was made. The issue of bonds was not marketable because of the low rate of interest. The condition of the market then existing favored the sale of bonds bearing not less than four and one-half per cent. interest. If the bond issue was made to bear interest at four and one-half per cent., and the Omaha Water Company should change its attitude and exchange its plant for the bonds, it might be possible to obtain the bonds directly from the Water Company,

and plaintiff was employed to negotiate on behalf of defendants for the purchase of such issue or so much of it as could be obtained. By the contract, plaintiff was employed to deliver public addresses and to bring to the attention of the twenty-eight improvement associations of Omaha, composed of property owners and taxpayers, the desirability of a bond issue bearing interest at the rate of four and one-half per cent. in order to carry out the purpose of the Water Board to purchase the water plant, and to do his work openly and not secretly, and to announce publicly that he was acting on behalf of defendants. This is, in substance, the employment alleged.

The public policy of a State is to be found in its constitution and statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of its government officials. The laws and public policy of the State permit and require the utmost freedom of contracting between competent parties, and it is only where a contract expressly contravenes the law or the known public policy of the State that courts will hold it void. *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180. As held in the *Zeigler* case: "There is no precise definition of public policy, and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. Each case, as it arises, must be judged and determined according to its own peculiar circumstances." Looking to the decisions of courts, where similar contracts were questioned on the ground of contravening public policy, we think it may be stated generally, as the result and trend of the decisions, that where a contract is made by an agent to address himself to property owners on a subject in which the principal who employs the agent is interested for gain, when the property owners' consent is necessary to the action of an official representative body, and when it

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does not appear that the contract contemplates the exercise of personal solicitation or personal influence, or the acting by the agent in a secret manner, require any services at all with the official representative body, but on the other hand, the services are to be performed openly and publicly, and without the use of money, such a contract is good and valid and not against public policy.

In *Union El. R. Co. v. Nixon*, 199 Ill. 235, it was held that an agreement to pay so much a month to a party to obtain frontage consents for a public improvement is not against public policy, even though extra pay is promised after the passage of the ordinance, if the party's efforts in obtaining consents have aided in the success of the enterprise, where the agent has nothing to do with the council, or the passage of the ordinance, except to get property owners' consents.

In *Paving Co. v. Botsford*, 56 Kan. 532, it was held that under chapter 99 of the Laws of 1887, of the State of Kansas, the action to be taken by the mayor and council of a city of the first class with respect to grading and paving depended to a great extent upon the consent of the owners of property fronting upon the street to be improved; and that it was competent for a paving company to employ attorneys and agents to give legal advice, and to collect and present facts as to the character and superior quality of the paving material which the company proposed to put in, to make arguments and openly and honestly endeavor to convince the reason and judgment of the property owners and the members of the city council that the interests of the owners and the public would be best subserved by the use of such paving material.

In *Houlton v. Nichol*, 93 Wis. 393, the plaintiff, a person of large experience in regard to Federal public lands, became satisfied that a certain class of lands that had been kept out of the market on account of a supposed claim under certain railroad grants could be legally thrown open to settlement, and entered into

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an agreement with defendant, who was desirous of acquiring such lands, to instruct the latter in regard to the manner of procuring the same, and to do all that was necessary to have such lands thrown open to settlement, in consideration of a certain proportion of the value of the land acquired by defendant. It was held that the contract was not *per se* invalid as against public policy as a lobbying contract. An appeal to reason and nothing more before an official or an official board is not opposed to public policy.

This question is discussed in *McBratney v. Chandler*, 22 Kan. 692; *Kansas Pac. R. Co. v. McCoy*, 8 Kan. 538; *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314; *Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Trist v. Child*, 21 Wall. (U. S.) 441, and many other cases, and it is unnecessary to more than refer to them. There is no presumption from the contract as set out in the statement of claim that it was an illegal contract. The defendants admit having made the contract as alleged, the motion to strike being in the nature of a demurrer. The presumption is in favor of innocence, and it is for the defendants to make the illegality apparent.

Appellee relies strongly upon *Crichfield v. Bermudez Asphalt Pav. Co.*, 174 Ill. 466. The grounds upon which the contract sued on in that case was held void, were: First, that the appellants therein entered into the service of the appellee as lobbyists, or, in the language of some of the cases, as log-rollers; and second, that "the making of a contract to promote the levying of a public assessment, not for the purpose of securing to the public a needed improvement, but for the purpose of enabling a paving company to get a job, is not only against the public interest, but is abhorrent to all proper ideas of justice and honor."

We do not construe the contract as set forth in the statement of claim as being obnoxious to these objections. The case is easily and clearly to be distinguished

The People v. Anderson, 188 Ill. App. 550.

from the case made in the statement in many salient features which appear upon a careful reading of the contracts in connection with the circumstances shown and the services contracted for. *Hazelton v. Scheckells*, 202 U. S. 71, involved a contract of an entirely different character from the contract before us. Without taking the time to distinguish the many cases cited by counsel for appellee, for that would unduly extend this opinion, we have reached the conclusion that the contract sued on is not such a contract as the courts will refuse to enforce on its face as alleged.

The judgment is reversed and the cause is remanded for a new trial.

Reversed and remanded.

The People of the State of Illinois, Defendant in Error, v. Gust Anderson, Plaintiff in Error.

Gen. No. 20,156. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed October 6, 1914.

Statement of the Case.

Complainant in the Municipal Court of Chicago by the People of the State of Illinois against Gust Anderson, charging defendant with assault and battery on Jonas Olson. To reverse a judgment finding defendant guilty, imposing a fine of \$100 and costs, and committing him to the House of Correction until the fine and costs are paid or worked out at the rate of \$1.50 per day, defendant prosecutes a writ of error.

HECTOR A. BROUILLET, for plaintiff in error.

MACLAY HOYNE and EDWARD E. WILSON, for defendant in error; JOSEPH R. FAHY, of counsel.

Duncanson v. Chicago Title & Trust Co., 188 Ill. App. 551.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. ASSAULT AND BATTERY, § 31*—*where proof of name of injured party sufficient.* A conviction for assault and battery held sustained by proof in the record of the name of the injured party, where it appeared that Anna Olson made the complaint charging the defendant with assault on Jonas Olson, and the evidence in the record shows that Jonas Olson was the husband of the complaining witness and the party who was struck and injured.

2. ASSAULT AND BATTERY, § 36*—*when judgment of conviction not improper.* A judgment finding defendant guilty of assault and battery held not subject to the objection that it required defendant to pay money to the injured party, where the record did not so show, it appearing that the court attempted to induce defendant to pay the injured party's doctor bill, etc., but the proposition was later rejected.

Charles Chapman v. Charles T. Richey et al.

On Appeal of Herbert W. Duncanson, Appellant, v. Chicago Title & Trust Company, Trustee, et al., Appellees.

Gen. No. 18,847. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Affirmed in part, reversed in part and remanded with directions. Opinion filed October 7, 1914. Rehearing denied October 22, 1914.

Statement of the Case.

Action commenced by Charles Chapman filing a bill against Charles T. Richey to foreclose a mechanic's lien on certain premises alleged to be owned by defendant.

The facts show that William J. Lukens sold the premises to Herbert W. Duncanson and to secure pay-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Duncanson v. Chicago Title & Trust Co., 188 Ill. App. 551.

ment of a part of the purchase price took a mortgage thereon subject to a first mortgage bond issue to be given for the improvement of the premises by the erection of an apartment building thereon. At the instance of Duncanson the premises were conveyed to Charles T. Richey, an employee of Duncanson, who appears to have been engaged in the building business. Duncanson arranged with a certain loan company for the negotiation by it of a \$40,000 bond issue to be secured by a first mortgage on the premises and the building to be constructed thereon, and Richey then executed a trust deed on said premises to the Chicago Title & Trust Company to secure the payment of the bond issue. Duncanson, then acting for Richey, contracted for work and material for the construction of the apartment building. Subsequently, Duncanson made a partial payment out of the proceeds of the bond issue to each of the several contractors, and upon the payment of said amounts each of the parties signed a receipt therefor and waiver of a lien, which, except as to date, amount and designation of work, is identical with the one as follows:

“Form 4606 Waiver.

\$5,000.

CHICAGO, April 27, 1906.

Received of Charles T. Richey Five Thousand and No/100 Dollars to apply on mason contract work Contract on building S. W. Cor. Evanston and Ainsley. The undersigned for and in consideration of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, does hereby waive and release any and all claims or liens on said building under any Acts in relation to mechanics' liens, approved or in force, on account of labor or materials, or both, furnished or which may be furnished by the undersigned for said premises.

CHAS. CHAPMAN, Contractor.”

About \$11,000 of the bond issue of \$40,000 remained unexpended in the hands of the loan company and such amount Duncanson and Richey directed the loan company to pay out upon the orders of one Edward Bitt-

ner, with whom one Smiley, acting for Duncanson, had negotiated an exchange of the property here involved for some property claimed to be owned by Bittner. Richey conveyed the property to Bittner, but before the delivery of the deeds by Bittner, Duncanson, acting for himself, Smiley and Richey, repudiated the transaction for false representations and a partial failure of consideration and filed a claim for a vendor's lien against the property in question for a pretended equity therein of \$9,400, and on the same day Bittner conveyed the property in question to one Anna M. Brooks.

After the filing of the bill to foreclose the mechanic's lien and while a motion for the appointment of a receiver was pending, a holder of more than twenty per cent. of the total bond issue notified the Chicago Title & Trust Company to institute foreclosure proceedings on the mortgage to secure the bonds on the ground there had been a default of the payment of general taxes and other conditions in the mortgage. The Chicago Title & Trust Company filed its bill to foreclose the trust deed and thereafter the suit was consolidated with the suit to foreclose the lien. The several lien claimants filed their answers and intervening petitions to enforce their liens, and a large number of bondholders answered the bill setting up ownership of their respective bonds.

The decree found there had been a default in the terms of the trust deed, in that taxes for a certain year had not been paid, and also in that mechanics' liens had been permitted to attach to the premises; that there was due the Chicago Title & Trust Company for its certain proper disbursements \$210.07, also for its solicitor's fees \$5,000, and for its services \$250; that certain sums were due the several bondholders. To reverse the decree, Herbert W. Duncanson appeals.

Duncanson v. Chicago Title & Trust Co., 188 Ill. App. 551.

ALDEN, LATHAM & YOUNG, for appellant.

HAMILTON & HAMILTON, HENRY W. LEMAN, ADAMS, CREWS, BOBB & WESCOTT, EDMUND S. CUMMINGS, CULVER, ANDREWS & KING and ROBERT L. STEPHENS, for appellees.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. COVENANTS, § 3*—*rule of construction.* The paramount rule for the interpretation of covenants is to so expound them as to give effect to the actual intent of the parties, collected not from a single clause but from the entire context.

2. MORTGAGES, § 87*—*when default accrues under covenant to pay taxes.* A covenant in a trust deed to pay taxes when they are due and not to suffer any part of the premises to be sold for taxes is a separable and independent covenant, for a breach of which a default accrues, and it is not necessary that the mortgagor should have suffered the premises to be sold for taxes.

3. MORTGAGES, § 667*—*when allowance of attorney's fees excessive.* On foreclosure of a trust deed providing for reasonable solicitor's fees, an allowance to the trustee of \$5,000 for such fees held excessive, and a sum of \$3,000 held to be ample compensation for the necessary services performed and the responsibility of the solicitor.

4. MORTGAGES, § 663*—*right of trustee to compensation.* In a foreclosure proceeding an allowance of \$250 to the trustee for the use of its name in the proceeding held unwarranted, but held that an allowance of \$50 would amply compensate the trustee for its services and the responsibility which devolved upon it.

5. MORTGAGES, § 545*—*when decree erroneous as to amount of interest.* On foreclosure of a trust deed given to secure a bond issue, a decree allowing a bondholder interest on his bonds from June 26, 1906, held erroneous where in his answer he claimed interest only from January 26, 1907.

6. MECHANICS' LIENS, § 135*—*necessity of consideration for agreement waiving lien.* A consideration is necessary to support a contract to waive the right to a mechanic's lien.

7. MECHANICS' LIENS, § 135*—*when agreement to waive lien without consideration.* Agreements to waive the right to mechanics'

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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liens contained in receipts given to the lien claimants for a part of the money due them are not supported by a consideration where there is no bona fide dispute between the parties, a compromise of which would be a consideration.

8. MECHANICS' LIENS, § 203*—*when decree erroneous as to amount of interest allowed.* A decree allowing lien claimants interest on their claims from the time of the completion of the work by them, instead of from the time they filed their petitions, *held* erroneous, where in their petitions they failed to ask for interest from the date of the completion of the work, and failed to demand an amount sufficient to authorize an allowance of interest from that date.

9. MORTGAGES, § 487*—*when cross-bill properly dismissed as presenting no meritorious equity.* In a consolidated action to foreclose a trust deed and for the enforcement of mechanics' liens on the premises, a cross-bill filed by the holder of the legal title and a person claiming as the beneficial owner asking for a vendor's lien on the property as against one to whom the holder of the legal title had conveyed the premises, *held* properly dismissed as presenting no meritorious equity, it appearing that the person claiming as beneficial owner never had invested a dollar in the property, and that he had contrived and manipulated the title to avoid personal liability.

Jacob Pianco by Sarah Pianco, Appellee, v. Herbert L. Joseph & Company, Appellant.

Gen. No. 18,860. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Reversed and remanded. Opinion filed October 7, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pianco v. Herbert L. Joseph & Co., 188 Ill. App. 555.

Statement of the Case.

Action by Jacob Pianco, a minor, by his next friend, Sarah Pianco, against Herbert L. Joseph & Company, a corporation, to recover damages for an alleged malicious prosecution. From a judgment entered on a verdict in favor of plaintiff for \$500, defendant appeals.

On October 4, 1907, appellee, who was then between sixteen and seventeen years of age, purchased from appellant a diamond ring for \$63, payable, as the instrument he then executed recites, \$8 down and the balance in weekly instalments of \$2. On February 22, 1908, appellee, having in the meantime paid the several accruing instalments on the purchase price of the ring, returned the same to appellant and purchased a larger ring priced to him at \$225, upon which he paid \$30 down and executed a contract of purchase therefor, whereby he agreed to pay the balance, \$195, in weekly instalments of \$4. He also then executed a blank form of chattel mortgage, which appellant thereafter filled in by inserting a general description of the ring and a consideration therefor of \$195, payable in weekly instalments of \$4, with interest at six per cent. per annum. Appellee having made no further payments upon the purchase price of the ring, appellant on March 4, 1910, procured an information to be filed in the Municipal Court, charging that on or about May 20, 1908, during the existence of the chattel mortgage lien thereon, appellee, without having the consent of appellant, did then and there unlawfully and feloniously conceal, remove and sell said diamond ring, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois. Appellee was arrested under a warrant issued out of the Municipal Court upon said information, and was held in custody for about six hours, when he was admitted to bail. Thereafter, upon a trial in the Municipal Court of the offense charged in the information, appellee was acquitted and finally discharged.

Pianco v. Herbert L. Joseph & Co., 188 Ill. App. 555.

SIDNEY LYON and ARTHUR C. BACHRACH, for appellant.

MAX M. GROSSMAN, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. MALICIOUS PROSECUTION, § 75*—*when evidence sufficient to show probable cause.* In an action for malicious prosecution by having plaintiff, who was a minor, arrested on a charge of unlawfully and feloniously concealing, removing and selling a diamond ring which he had purchased of defendant on the instalment plan, a verdict for plaintiff *held* against the weight of the evidence, it appearing that defendant had probable cause to institute the criminal prosecution by reason of his falsely representing himself to be of age and his concealment of his whereabouts.

2. MALICIOUS PROSECUTION, § 7*—*what constitutes probable cause.* A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged, constitutes probable cause under the law.

3. MALICIOUS PROSECUTION, § 88*—*when instruction erroneous.* In an action for malicious prosecution, an instruction given for plaintiff *held* erroneous, in that it failed to require the jury to find the facts upon which the announcement of law was predicated, by a preponderance of the evidence.

4. DAMAGES, § 206*—*when instruction erroneous.* An instruction relating to the measure of damages *held* erroneous for including certain elements not supported by the evidence, and also faulty in failing to limit the jury to the consideration of such proper elements of damage as are shown by the evidence.

5. APPEAL AND ERROR, § 1241*—*when party cannot complain of instructions.* Where a party tenders two or more instructions embodying the same legal principle, he cannot be heard to complain if the court adopts and gives the instruction which is least favorable to him.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Devine v. Chicago City Ry. Co. et al., 188 Ill. App. 558.

John F. Devine, Administrator, Appellee, v. Chicago City Railway Company and Calumet & South Chicago Railway Company, Appellants.

Gen. No. 18,876. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Reversed with finding of fact. Opinion filed October 7, 1914. Rehearing denied October 17, 1914.

Statement of the Case.

Action by John F. Devine, administrator of the estate of James Dwyer, deceased, against Chicago City Railway Company and Calumet & South Chicago Railway Company to recover damages for wrongfully causing the death of plaintiff's intestate. From a judgment entered on a verdict in favor of plaintiff for five thousand dollars, defendants appeal.

At the time of the accident in question there were upon South Chicago avenue, which runs in a northwesterly and southeasterly direction, two street car tracks, the east track being the northbound track and the west track being the southbound track. The decedent was employed by the Chicago City Railway Company in the work of repaving the right of way with brick, and was one of a gang of thirteen or fourteen men so employed. They were working southward from 70th street, taking up the old brick, cleaning such of the old brick as were fit for use in repaving, and repaving the southbound track and the center space between the two tracks. When the old brick were removed from the pavement they were carried by the men to the west curb of the street and such as were fit for use in repaving were there cleaned and piled up with the new brick necessary to be used. Shortly after seven o'clock on the morning of the accident, the decedent picked up several bricks from the pile at

Devine v. Chicago City Ry. Co. et al., 188 Ill. App. 558.

the west curb, and carrying them on his arm, walked in a northeasterly direction towards the car tracks. When he reached the center space between the two tracks he stopped and stooped over for the purpose of dropping or placing the brick in said center space, and while in such stooped position was struck on the right side or shoulder by the corner of a northbound car approaching on the east track, and thereby sustained injuries which resulted in his death.

WARNER H. ROBINSON and CHARLES LEROY BROWN, for appellants; LEONARD A. BUSBY, of counsel.

GEORGE E. GORMAN, for appellee; JOHN M. POLLOCK, of counsel.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 157*—*necessity of proof of due care.* An allegation in a declaration that plaintiff's intestate was in the exercise of due care for his own safety is a necessary and material allegation which plaintiff is required to prove.

2. NEGLIGENCE, § 156*—*when presumption arising from instinct for life preservation not operative to establish due care.* The presumption arising from the natural instinct prompting the preservation of life and the avoidance of injury does not become operative to establish due care on the part of a person killed, where the conduct of such person immediately before and at the time of accident is described by eyewitnesses and there is nothing in the facts and circumstances surrounding the accident to indicate that he perceived the danger to which he was exposed.

3. NEGLIGENCE, § 156*—*effect of presumption that persons will perform their duty.* While there is a presumption of law that every person will perform the duty enjoined by law or imposed by contract, and anticipation of negligence in others is not a duty which the law imposes, such presumption is not a conclusive one in determining questions of negligence, and no one has a right to rely solely on it in regulating his conduct.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Brockhaus v. Garner, 188 Ill. App. 560.

4. APPEAL AND ERROR, § 1802*—*when reversal with finding of fact proper.* On appeal from a judgment in favor of plaintiff in a suit for wrongful death, *held* it was the duty of the Appellate Court to reverse the judgment with a finding of fact, where there was no evidence to show that the decedent was in the exercise of due care for his own safety, or proof of any facts or circumstances from which due care on his part might be inferred.

Dorothy Brockhaus by Margaret A. Brockhaus, Defendant in Error, v. Agnes B. Garner, Plaintiff in Error.

Gen. No. 18,903. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed October 7, 1914.

Statement of the Case.

Action of the fourth class brought in the Municipal Court of Chicago by Dorothy Brockhaus, an infant, by Margaret A. Brockhaus, her next friend, against Agnes B. Garner to recover damages for personal injuries alleged to have been occasioned by the negligence of the defendant. A statement of claim and demand for a jury trial were filed on behalf of the plaintiff, and on August 23, 1912, the defendant entered her general appearance and moved the court to require the plaintiff to file a more specific statement of claim. This motion was allowed and plaintiff was ruled to file a more specific statement of claim within five days, and defendant was allowed ten days within which to file her affidavit of merits. On August 26, 1912, a more specific and sufficient statement of claim was filed on behalf of the plaintiff, but defendant failed to file her affidavit of merits, and on September 4, 1912, judgment was entered against her by default for her failure to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

file and for want of such affidavit of merits. On September 10, 1912, the defendant having failed to take any further steps in the case, a jury was impaneled to assess the damages of the plaintiff, and proceedings appear to have been then had resulting in a verdict and judgment against the defendant for three hundred dollars damages. Thereafter the defendant moved the court to vacate and set aside such judgment, which motion was overruled, and defendant then prosecuted this writ of error.

CHARLES TURNER BROWN, for plaintiff in error.

BEACH & BEACH, for defendant in error.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*sufficiency of affidavit to plaintiff's statement of claim.* Where a statement of claim of a minor plaintiff purported to be made by an agent and it was urged by the defendant that since an infant is without capacity to appoint an agent the court had no jurisdiction of the subject-matter of the cause of action or of the person of the plaintiff, and that no summons could properly issue against the defendant, *held* that the court had jurisdiction of defendant by her entering a general appearance, and that the informality, if any, in the affidavit did not operate to deprive the court of jurisdiction of the subject-matter.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*when objection to sufficiency of affidavit to statement of claim cannot be raised.* Insufficiency of an affidavit to plaintiff's statement of claim cannot be first raised after verdict and judgment to defeat a recovery upon a cause of action of which the court has jurisdiction of the subject-matter.

3. MUNICIPAL COURT OF CHICAGO, § 19*—*when entry of judgment by default irregular.* In a fourth class action in the Municipal Court to recover personal injuries, where the defendant entered her general appearance but failed to file an affidavit of merits within the time allowed by the court, the entry of a judgment by default *held* irregular; the judgment should be *nil dicit*, or for want of plea.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Englestein v. Bartholomae et al., 188 Ill. App. 562.

4. MUNICIPAL COURT OF CHICAGO, § 30*—*when irregularity in entering default judgment not ground for reversal.* Irregularity in entering a judgment by default instead of a judgment *nil dicit*, or for want of plea, *held* not to require reversal of the judgment upon the merits.

Harry M. Englestein et al., trading as Harry M. Englestein & Company, Plaintiffs in Error, v. William Bartholomae and Frederick Bartholomae, Defendants in Error.

Gen. No. 19,040. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FREDERICK C. HILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed and remanded. Opinion filed October 7, 1914.

Statement of the Case.

Action by Harry M. Englestein and Louis Englestein, copartners, trading as Harry M. Englestein and Company, against William Bartholomae and Frederick Bartholomae to recover real estate brokerage commissions. A trial by the court resulted in a finding in favor of defendants and judgment against plaintiffs for costs. To reverse the judgment, plaintiffs bring error.

The controverted facts showed that in May, 1912, defendants in error agreed in writing through plaintiffs in error as their brokers to sell for \$12,000 their property, then being operated as a "nickel theatre," to one Stone, who contemplated associating with him in the purchase of the property, Charles Benesch and George Paul; that defendants in error then agreed to pay plaintiffs in error a commission of two and one-half per cent.; that the contract was not signed by

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stone, because he was unable to complete satisfactory negotiations with Benesch, and was unable personally to raise the required cash payment of \$5,000; that shortly thereafter plaintiffs in error informed defendants in error that they believed they could sell the property for \$12,500, and in that event they should have an additional commission of \$300; that plaintiffs in error were informed by Stone that Benesch was a prospective purchaser, and thereupon they interviewed Benesch and arranged a meeting between defendants in error and Benesch to negotiate for the property; that plaintiffs in error accompanied Benesch to the place of business of defendants in error and then introduced Benesch to defendants in error as a prospective purchaser; that that was the first occasion upon which Benesch had ever personally met or "talked business" with defendants in error; that on several occasions thereafter plaintiffs in error interviewed defendants in error and were informed by the latter that they were not ready to close a deal; that on July 18th following, defendants in error, without the knowledge of plaintiffs in error, sold the property to Benesch for \$12,500, and refused to pay plaintiffs in error any commission on said sale.

BERNSTEIN, GROSSMAN & BERNSTEIN, for plaintiffs in error.

ALBERT H. MEADS, for defendants in error.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 48*—*when entitled to commissions on sale made by principal.* Where a broker has been employed by the seller to find a purchaser for his property and through his efforts the seller has been brought into communication with the purchaser, he cannot

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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be deprived of his commissions because the seller takes up and completes the negotiations himself or through another party.

2. **BROKERS, § 90***—*when finding against right to commissions not sustained by the evidence.* In an action to recover commissions on a sale of real estate, a finding for defendants *held* against the weight of the evidence, it appearing that the defendants sold the property to a person with whom the plaintiffs had negotiated to sell the property and had introduced him to defendants as a prospective purchaser.

James B. Madsen, trading as J. B. Madsen & Company,
Plaintiff in Error, v. N. B. Cordell, Defendant in
Error.

Gen. No. 19,089. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. *Affirmed.* Opinion filed October 7, 1914.

Statement of the Case.

Action by James B. Madsen, trading as J. B. Madsen & Company, against N. B. Cordell to recover a balance alleged to be due for certain trade fixtures and certain extras sold and delivered to the defendant for the equipment of a butcher shop. Defendant filed his affidavit of merits wherein he claimed a set-off by reason of the failure of plaintiff to furnish a sufficient ice box and the refusal of defendant to accept the ice box furnished by the plaintiff. A trial by the court resulted in a finding in favor of defendant upon his claim of set-off, and judgment was entered against plaintiff for \$83. To reverse the judgment, plaintiff brings error.

The order for the fixtures was given June 24, 1912. The ice box included in the order was not installed ready for the reception of ice until July 12 or 13,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

1912, and some extras necessary for the proper equipment of the ice box were not supplied and installed until August 19, 1912. On July 18, 1912, defendant in error paid plaintiff in error on account \$400. It was conceded that the charge for the ice box, which was included in the total amount of \$540 stated in the original order, was \$282. The ice box was manufactured by plaintiff in error in his factory in sections and was so delivered on the premises of defendant in error, where the several sections were united and the doors and partitions installed by the employees of plaintiff in error.

It was uncontroverted that after defendant in error commenced to use the ice box for the storage of meat the lowest temperature obtainable was from 44 to 54 degrees, and that the temperature required for the proper preservation of meat is from 38 to 40 degrees. It was also uncontroverted that on August 20, 1912, defendant in error observed a crack or opening $1 \frac{1}{16}$ inches in width in the rear of the ice box, occasioned either by the separation of the sections forming its construction, or the coming apart of the matched flooring of which the several sections were constructed. There was evidence that the ice box was wholly inefficient to serve the purpose for which it was designed, and that defendant in error repeatedly complained to plaintiff in error of the failure of the ice box to maintain the proper temperature, and of the defective workmanship and material resulting in the openings or cracks in the rear of the ice box and of its defective condition in other particulars, and that plaintiff in error disregarded such complaints and made no attempt to remedy the defects complained of. On September 20, 1912, defendant in error removed the ice box from his butcher shop to the rear of his premises and refused to accept the same upon his order therefor.

It is insisted on behalf of plaintiff in error that there was an acceptance by defendant in error of the ice box

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in question: First, by his several receipts for the various portions of the ice box, as being in good order when they were delivered at his shop, and by the several "O.K.'s" by defendant in error upon time cards which plaintiff in error required his mechanics to furnish in order that they might receive credit for the time employed by them in the performance of their work; and second, by his having used the ice box from the time it was installed in his shop in July or August, 1912, until September 20, 1912.

STEDMAN & SOELKE, for plaintiff in error.

JOHN J. SWENIE and M. R. HARRIS, for defendant in error; T. F. MONAHAN, of counsel.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 251*—*when implied warranty that article is fit for purpose designed.* Where a manufacturer contracts to supply an article which he manufactures for a particular purpose designed by the buyer and known to the vendor, so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the purpose to which it is to be applied.

2. SALES, § 279*—*when signing good order receipt not waiver of implied warrants.* The fact that a buyer of an article signed a good order receipt of the several fragments of the article when delivered by a teamster, held not to estop the buyer from denying that the article would comply with an implied warranty when the fragments are assembled.

3. SALES, § 276*—*time within which goods may be returned for breach of warranty.* A buyer of an article has a reasonable time within which to reject it after it has failed to comply with an implied warranty; and in determining what is such a reasonable time, the conduct of the seller, and what he said and did, may be taken into consideration.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**White Oak Coal Company, Defendant in Error, v. John
Worthington, Plaintiff in Error.**

Gen. No. 19,113. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed and judgment here. Opinion filed October 7, 1914.

Statement of the Case.

Action by White Oak Coal Company against John Worthington to recover \$679.11 for coal delivered at and consumed in heating an apartment building owned by defendant.

One Ebbert, a coal salesman employed by the plaintiff, was a tenant of the defendant for the term of one year beginning May 1, 1910, at a rental of \$60 a month, payable in advance. Ebbert paid the rent for May, June and July, 1910, in cash, and thereafter until December 12, 1910, at his solicitation, the defendant accepted coal for the rent accruing to February 1, 1911. This coal was procured by Ebbert from Thos. W. Gilmore & Co. and delivered at the building. In the latter part of January, 1911, defendant directed Ebbert to fill up the basement of the building with coal, and Ebbert communicated this order to the bookkeeper or local manager of the plaintiff and plaintiff delivered the coal in question during February and March, 1911. During this time Robert F. Schenck, or Robert F. Schenck & Co., were the rental agents of defendant for the apartment building, and the charges for the coal so delivered were entered upon the books of the plaintiff against R. F. Schenck & Co., and the two invoices for said coal, bearing date March 1, 1911, and April 1, 1911, respectively, were made out as follows:

“Sold to.....R. F. Schenck, Agt.
Delivered.....J. Worthington Bldg.
45th & Drexel, Address 100 Washington St.”

White Oak Coal Co. v. Worthington, 188 Ill. App. 567.

Statements of the coal delivered were sent by the plaintiff to Schenck and by him were sent to the defendant. Ebbert vacated the apartment at the end of his term on May 1, 1911, without having paid the rent for February, March and April, amounting to \$180.

Upon a trial of the cause by the court without a jury there was a finding and judgment against defendant for \$499.11, the full amount of plaintiff's claim, less \$180, being the amount of rent due from Ebbert to the defendant. To reverse this judgment, the defendant prosecutes a writ of error and the plaintiff assigns cross-errors questioning the propriety of the action of the court in allowing to defendant, as a credit upon plaintiff's claim, the rent due from Ebbert.

ROBERT B. CLARK, for plaintiff in error.

CHARLES HUDSON, for defendant in error.

• MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 50*—*Liability for coal procured for benefit of another.* In an action for the purchase price of coal delivered and consumed at defendant's apartment building, where defendant claimed that he directed a tenant in his building to procure the coal on his own credit under an agreement with him that he should pay his rent in coal, *held* that a finding that defendant was primarily liable for the coal was sustained by the evidence, it appearing that the tenant was not indebted to defendant at the time he ordered the coal and that the amount of the coal ordered was too great to apply on rents to become due, but *held* that the further finding that defendant was entitled to a deduction of a sum due him from the tenant for rent which accrued after the coal was ordered, could not be sustained for the reason there was no proof tending to show that plaintiff consented to or acquiesced in the allowance of the deduction.

2. SALES, § 285*—*what not an election to discharge person for whose benefit coal was purchased.* The fact that a seller of coal gave

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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credit in the first instance to an agent of the person to whom the coal was delivered and the fact that the plaintiff first commenced an action against the agent, *held* not conclusive of an election by the seller to discharge the principal.

3. APPEAL AND ERROR, § 864*—*necessity that evidence appear in abstract.* The Appellate Court is not required to search the record for evidence which does not appear in the abstract of record.

Thomas Lanigan et al., trading as Lanigan & Kleckner, Defendants in Error, v. J. C. Henderson & Company, Plaintiff in Error.

Gen. No. 19,163.

1. FACTORS, § 26*—*measure of damages for selling hogs in violation of instructions.* In an action against a live stock commission company to recover damages resulting from the defendant selling plaintiffs' hogs in violation of instructions to hold them over for two days more for an advance in the market price, a finding of the trial court allowing plaintiffs the increase in the market price, without allowing any deduction for the expense and loss necessarily involved in keeping the hogs over, *held* erroneous where it was established by the evidence that the daily expense for holding over hogs approximated ten cents per hundred pounds and that there was ordinarily some shrinkage in weight.

2. MUNICIPAL COURT OF CHICAGO, § 28*—*when insufficiency of affidavit of merits cannot be considered on review.* An objection to the affidavit of merits based on the ground that it is insufficient under the rules of the Municipal Court to raise an issue on a particular fact alleged in the statement of claim, cannot be urged on review where the rules of the Municipal Court are not preserved in the record, and it appeared that the rules were ignored on the trial by both parties introducing evidence in support of their several contentions regarding such fact.

3. MUNICIPAL COURT OF CHICAGO, § 29*—*judicial notice of rules.* The Appellate Court cannot take judicial notice of rules of the Municipal Court where they are not preserved in the record.

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed and remanded. Opinion filed October 7, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lanigan v. J. C. Henderson & Co., 188 Ill. App. 569.

PATTISON & SHAW, for plaintiff in error; DOUGLAS C. GREGG, of counsel.

P. J. TUOHY, for defendants in error.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

This is a suit instituted in the Municipal Court by Thomas Lanigan and G. S. Kleckner, copartners, against J. C. Henderson & Company, a corporation, to recover damages claimed to have been sustained by reason of the alleged wrongful conduct of the defendant in selling five carloads of hogs on March 18, 1912, contrary to the direction of the plaintiffs to the defendant to hold said hogs for sale until March 20, 1912, at which time the market price of hogs had advanced materially above the market price which prevailed on March 18th. A trial by the court without a jury resulted in a finding and judgment against the defendant for \$176.34, to reverse which judgment this writ of error is prosecuted.

Defendants in error are buyers and shippers of hogs and cattle doing business at Hudson, Iowa, and plaintiff in error is engaged in the live stock commission business at the Union Stock Yards in Chicago. On Monday, March 18, 1912, Thomas Lanigan, one of the defendants in error, arrived at the stock yards with five carloads of hogs consigned to plaintiff in error for sale. When the hogs were unloaded, about seven o'clock in the morning, Lanigan met one Sweetman, a salesman, employed by plaintiff in error, with whom Lanigan discussed the advisability of selling the hogs at the then prevailing market price.

Lanigan testified that after considering the matter and canvassing the situation, he directed Sweetman not to sell the hogs that day, but hold the same for sale until Wednesday, March 20th.

The market on Monday opened at about \$6.85 bid, and continued to advance during the day. Lanigan

left the stock yards shortly after one o'clock in the afternoon, and during his absence, later in the afternoon, Sweetman sold the five carloads of hogs for \$7.05. The market continued to advance on Tuesday and a further advance prevailed on Wednesday, when hogs of the quality shipped by defendants in error realized \$7.25 to \$7.40.

The frictional question of fact in the case is whether or not Lanigan directed Sweetman to hold the hogs for sale until Wednesday, March 20th, and plaintiff in error insists that the finding of the court upon that issue is against the manifest weight of the evidence.

Sweetman denied that he received any such directions from Lanigan, but the facts and circumstances in evidence tend to corroborate Lanigan rather than Sweetman, and if this was the only controlling question in the case, we would affirm the judgment.

It is clearly established by the evidence that the actual daily expense involved in carrying over hogs at the stock yards approximate ten cents per one hundred pounds, at least for the first two or three days that hogs are so carried over, and that there is also ordinarily some shrinkage in the weight of the hogs during that time.

The third proposition of law submitted by plaintiff in error and refused by the court is as follows:

“That in determining the question of damages, if any, to which the plaintiffs may be entitled, the law is the plaintiffs shall recover any increase in price that would accrue if said hogs had been held over to the time directed, and therefrom should be deducted any cost or expense that it would be necessary to pay out to carry over said hogs to such time, and any shrinkage in the weight of said hogs.”

Defendants in error are only entitled to recover as damages the actual pecuniary loss, if any, sustained by them by reason of the failure of plaintiff in error to comply with the direction to hold the hogs for sale, until Wednesday, March 20th. If a compliance by

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plaintiff in error with such direction necessarily involved additional expense or loss, such expense or loss would properly be chargeable to and should be borne by defendants in error. In view of the fact that the amount of damages assessed by the trial court was predicated upon findings that the prevailing market price on Wednesday, and the price which defendants in error would have realized if their direction to hold the hogs for sale until that time had been complied with, was \$7.25, and that defendants in error were entitled to recover the difference between that price and \$7.05, the price at which the hogs were sold on Monday, the third proposition of law submitted by plaintiff in error was of controlling influence upon the question of the amount of damages recoverable by defendants in error. Under the ruling of the trial court defendants in error were allowed the benefit of the prevailing market price on Wednesday without any deduction whatever for expense and loss necessarily involved in carrying the hogs until such market price could be realized. The proposition should have been held as the law of the case, and applied to the facts as found.

It is said that under the pleadings in the case and under the rules of the Municipal Court applicable thereto, the affidavit of merits filed by plaintiff in error was insufficient to raise an issue of fact upon the question of the market price of hogs on Wednesday, and whether or not defendants in error would have then realized \$7.47½ for their hogs, as alleged in their statement of claim. The rules of the Municipal Court relied upon by defendants in error are not preserved in the record and we are not permitted to take judicial notice of them. *Sixby v. Chicago City Ry. Co.*, 260 Ill. 478. Furthermore, the said rules, as they are claimed to exist, appear to have been ignored or not availed of upon the trial in the court below, because both parties introduced evidence in support of their several

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contentions, as to the quality of the hogs in question and the prevailing market price of such hogs on Wednesday.

The other errors assigned are unsubstantial.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Sam Frankenstein, Defendant in Error, v. Max Weber and David Weber, Copartners, trading as Weber Brothers, Plaintiffs in Error.

Gen. No. 19,198. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed October 7, 1914.

Statement of the Case.

Action by Sam Frankenstein against Max Weber and David Weber, copartners, trading as Weber Brothers, to recover a balance alleged to be due for goods, wares and merchandise sold and delivered. Upon a trial by the court there was a finding and judgment against defendants for the amount claimed to be due. To reverse the judgment, defendants bring error.

A. L. WEBER, for plaintiffs in error.

ISAAC ANDERSON LOEB, for defendant in error.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Daniels v. Chicago, B. & Q. Ry. Co. et al., 188 Ill. App. 574.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 26*—*sufficiency of statement of facts*. The record does not contain a correct statement of facts, where what purports to be such a statement is merely a statement that certain witnesses testified to certain facts, in substance, as there stated in narrative form.

2. SALES, § 329*—*sufficiency of evidence*. On review of a judgment for the purchase price of goods sold and delivered, evidence in the record as presented *held* to show an original promise by defendants to pay for the articles furnished.

Henrietta G. Daniels, Defendant in Error, v. Chicago, Burlington & Quincy Railway Company and Chicago, Burlington & Quincy Railroad Company, Plaintiffs in Error.

Gen. No. 19,225. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LABUY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed October 7, 1914.

Statement of the Case.

Action by Henrietta G. Daniels against Chicago, Burlington & Quincy Railway Company and Chicago, Burlington & Quincy Railroad Company to recover damages for personal injuries claimed to have been occasioned by the negligence of defendants. The amended statement of claim filed by plaintiff December 12, 1912, alleged that the injuries complained of were sustained January 23, 1911. Defendants' affidavit of merits denied that plaintiff sustained the injuries complained of on or about January 23, 1911, and averred that on or about December 31, 1909, plaintiff was a passenger on one of defendants' trains and in alighting therefrom she slipped and fell, and further

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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averred that any cause of action that may have accrued to her was barred by the statute of limitations. A trial by the court resulted in a finding and judgment against the defendants for three hundred and fifty dollars. To reverse the judgment, defendants prosecute a writ of error.

J. A. CONNELL and S. F. BLANC, for plaintiffs in error.

EARL J. WALKER, for defendant in error.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

LIMITATION OF ACTIONS, § 115*—*burden of proof*. The statute of limitations is an affirmative defense, and the burden of proving it is upon the party pleading it.

Franz Koch et al., trading as Koch & Company, Appellants, v. John H. Suderwski, Appellee.

Gen. No. 19,291. (Not to be reported in full.)

Appeal from the County Court of Cook County; the Hon. ISAAC HUDSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed and remanded. Opinion filed October 7, 1914.

Statement of the Case.

Action in assumpsit instituted in the County Court by Franz Koch, Frank J. Koch, John A. Richert and Arnold Brautigam, trading as Koch & Company, against John H. Suderwski. Plaintiffs filed a declaration consisting of the common counts, and attached

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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thereto their affidavit of claim. Plaintiffs also filed a bill of particulars. Defendant filed an affidavit of merits and a verified claim of set-off, to which plaintiff pleaded the general issue, accord and satisfaction and the Five-Year Statute of Limitations. A jury was impaneled and before the introduction of any evidence, and again at the close of plaintiffs' evidence and at the close of all the evidence, plaintiffs called the attention of the court to the fact that defendant had neither pleaded the general issue nor replied to plaintiffs' pleas of accord and satisfaction and the statute of limitations filed to defendant's plea of set-off. The trial court overruled plaintiffs' motion for a peremptory instruction upon the pleadings filed and submitted the case to the jury. The jury returned a verdict for defendant on his plea of set-off and assessed his damages against plaintiffs at \$245. To reverse a judgment entered on the verdict, plaintiffs appeal.

ADLER & LEDERER, for appellants; JULIUS R. KLAU-
ANS, of counsel.

F. W. PROUDFOOT, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion
of the court.

Abstract of the Decision.

PLEADING, § 462*—*when rule that proceeding to trial waives non-joinder of issues inapplicable.* The rule that a party having proceeded to trial without objection, as upon issues joined, cannot after verdict or for the first time in a court of review be permitted to take advantage of the failure of the opposite party to file proper pleas, *held* to have no application where the record discloses that timely and repeated objections had been made in the trial court to the procedure adopted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

In the Matter of the Estate of Wolf Freilich, Deceased.
On Appeal of Eva Freilich, Executrix, Appellant, v.
Jacob Wener, trading as J. Wener & Company et al.,
Appellees.

Gen. No. 19,808.

1. EXECUTORS AND ADMINISTRATORS, § 236*—*when limitation begins to run against seventh-class claims.* The limitation barring seventh-class claims, except as to subsequently discovered assets, when not presented within one year from the granting of letters, begins to run from the time letters testamentary or of administration are granted and not from the time letters are granted to an administrator to collect.

2. EXECUTORS AND ADMINISTRATORS, § 231*—*words in section 70 of Administration Act construed.* The phrase "letters as aforesaid," employed in the seventh clause of section 70 of the Administration Act, J. & A. ¶ 119, construed as referring to letters testamentary or of administration as distinguished from letters granted to an administrator to collect, as provided in section 11 of the Act, J. & A. ¶ 59.

Appeal from the Circuit Court of Cook county; the Hon. H. STERLING POMEROY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed October 7, 1914.

ELIJAH N. ZOLINE, for appellant.

HINER, BUNCH & LATIMER, for appellees.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

On appeal to the Circuit Court from judgments of the Probate Court allowing the claims of Schwabe, Loewenstein & Co. and J. Wener & Co. against the estate of Wolf Freilich, deceased, as of the seventh class, to be paid in due course of administration, said appeals were consolidated and heard in the Circuit Court upon an agreed statement of facts, as follows:

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Frellich v. Wener, 188 Ill. App. 577.

“On October 18, 1911, the claims of J. Wener & Co. and Schwabe, Loewenstein & Co. were filed in the Probate Court of Cook County against the estate of Wolf Freilich, deceased. It is admitted that said claims are true and correct, and if filed within the statutory period should be allowed in full.

“Letters of administration to collect were issued to Eva Freilich as administratrix to collect on the 21st day of September, 1910, by the Probate Court of Cook County; on October 17, 1910, said administratrix to collect, filed an inventory of the real and personal estate of said decedent; and on October 19, 1910, letters testamentary were issued to Eva Freilich as executrix of said estate; that on October 18, 1911, said claims of J. Wener & Co. and Schwabe, Loewenstein & Co. were filed as aforesaid.

“The sole question of law to be decided is whether said claims were filed with the Probate Court of Cook County ‘within one year from granting of letters.’ The defendant claims that the running of the year commences from the time of the issuance of letters of administration to collect, while plaintiffs (the creditors) claim it commences from the date of the issuance of letters testamentary. The Probate Court of Cook County and the Circuit Court of Cook County decided against the contention of the defendant and entered judgment in favor of the claimants.”

Upon the hearing in the Circuit Court a jury was waived, and two propositions of law submitted by the defendant were refused by the court, and judgments were thereupon entered against said estate in favor of J. Wener & Co. for \$580.16 and in favor of Schwabe, Loewenstein & Co. for \$371, as of the seventh class, to be paid in due course of administration. From said judgments the executrix prosecutes her further appeal to this court.

The two propositions of law above mentioned as having been submitted by appellant to be held as the

law of the case, and which were refused by the court, are as follows:

“I. The court holds as a proposition of law in this case that a claim must be filed within one year from granting letters of administration to collect, in order that the same may be paid out of inventoried assets.

“II. The court holds that in the Estate of Wolf Freilich, deceased, letters to collect were issued to Eva Freilich, Administratrix to Collect, on September 21, 1910; that thereafter on the 17th day of October, 1910, said Administratrix to Collect filed her inventory herein as provided by law; and thereafter, to-wit, on October 18, 1911, the claims of J. Wener & Co. and Schwabe, Lowenstein & Co., were filed in the Probate Court of Cook County, which was after one year from the granting of letters to collect; and the court, therefore, holds as a proposition of law that said claim may be allowed and paid pro rata as a claim of the seventh class, out of such subsequently discovered assets of said Estate as may be discovered to be not inventoried and not accounted for.”

The solution of the question presented involves a consideration of several sections of the statute relating to the administration of estates.

Section 1 (J. & A. ¶ 49) provides that when a will has been duly proved and allowed, letters testamentary shall issue thereon, and section 10 (J. & A. ¶ 58) prescribes the form of such letters testamentary. Section 11 (J. & A. ¶ 59) is as follows:

“During any contest in relation to the probate of any will, testament or codicil, before the same is recorded, or until a will which may have once existed, but is destroyed or concealed, is established, and the substance thereof committed to record, with proof thereupon taken, or during any contest in regard to the right of executorship, or to administer the estate of any person dying either testate or intestate, or whenever any other contingency happens which is productive of great delay before letters testamentary or of administration can be issued upon the estate of such

Freilich v. Wener, 188 Ill. App. 577.

testator or intestate, to the person or persons having legal preference to the same, the county court may appoint any person or persons as administrators, to collect and preserve the estate of any such decedent, until probate of his will, or until administration of his estate is granted, taking bond and security for the collection of the estate, making an inventory thereof, and safe keeping and delivering up the same when thereunto required by the court, to the proper executor or administrator, whenever they shall be admitted and qualified as such."

Section 12 (J. & A. ¶ 60) prescribes the form of letters to be granted to the person or persons appointed to collect and preserve the estate of the decedent.

Section 15 (J. & A. ¶ 63) is as follows:

"Every collector so appointed shall have the power to collect the goods, chattels and debts of the said deceased, according to the tenor of the said letters, and to secure the same at such reasonable and necessary expense as shall be allowed by the court; and the said court may authorize him, immediately after the inventory and appraisement of such estate, to sell such as are perishable, or may depreciate by delay, and to account for the same; and for the whole trouble incurred by such collector the court may allow such commission on the amount of the said personal estate as shall be actually collected and delivered to the proper executor or administrator, as aforesaid, as said court may deem just and reasonable: *Provided*, the same shall not exceed six per cent. on the amount stated in such inventory or bill of appraisement."

Section 17 (J. & A. ¶ 65) provides that on the granting of letters testamentary or of administration, the power of any such collector, so appointed, shall cease, and it shall be his duty to deliver, on demand, all property and money of the deceased to the person or persons obtaining such letters, and prescribes a penalty in case such collector fails so to do.

Section 18 (J. & A. ¶ 66) provides for the granting

of letters of administration of the estate of all persons dying intestate, and section 21 (J. & A. ¶ 70) prescribes the form of such letters.

Section 51 (J. & A. ¶ 100) provides that whenever letters testamentary of administration or of collection are granted, the executor or administrator shall make out a full and perfect inventory of the real and personal estate of the decedent, and return the same to the office of the clerk of the County Court within three months from the date of the letters testamentary or of administration.

Section 60 (J. & A. ¶ 109) requires every administrator or executor to fix upon a term of the court within six months from the time of his qualification, for the adjustment of all claims against the decedent, and to give the prescribed notice to persons having such claims.

Section 70 (J. & A. ¶ 119) provides, in part, seventh clause, as follows:

“All [of] other debts and demands of whatever kind without regard to quality or dignity which shall be exhibited to the court *within one year from granting of letters as aforesaid*, and all demands not exhibited within one year as aforesaid shall be forever barred unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid pro rata out of such subsequently discovered estate, saving, however, to infants, persons of unsound mind, persons without the United States, in the employment of the United States or of this state, the term of one year after their respective disabilities are removed to exhibit their claims.”

If the words “letters as aforesaid,” as employed in the seventh clause of section 70, above quoted, are intended to include letters granted by the Probate Court to a collector or administrator to collect, as provided in section 11 of the Act, the claims here involved were not exhibited by appellee within the time necessary to

Frellich v. Wener, 188 Ill. App. 577.

entitle them to be paid out of the estate of the decedent inventoried or accounted for by the administrator to collect, and the judgments must be reversed, or so modified as to make said claims payable only out of any subsequently discovered estate of the decedent.

It may be conceded that observance of the strict letter of the language employed in the seventh clause of section 70 would compel an interpretation of the phrase "letters as aforesaid," as being inclusive of letters granted to an administrator appointed to collect under the provisions of section 11, but the letter of a statute is subordinate to the intention. "A thing within the intention is regarded as within the statute though not within the letter, and a thing within the letter is not within the statute unless within the intention." *People ex rel. Krause v. Harrison*, 191 Ill. 257, 266.

An administrator to collect, or collector, is merely a temporary officer appointed by the court to collect and preserve the estate of a decedent "until probate of his will, or until administration of his estate is granted." He is without authority either to adjust the claims of creditors against his decedent, or to pay out the funds of the estate coming into his hands. *People ex rel. Bulkley v. Salomon*, 184 Ill. 490; *In re Estate of Wincox*, 186 Ill. 445. That the administration of the estate of a decedent, in accordance with the provisions of the act relating to the administration of estates, was not contemplated by the Legislature to be entered upon until letters testamentary or of administration, as distinguished from letters "of collection" were granted, is apparent from a consideration of the language employed in the several sections of the act.

Under section 11, the contingency which authorizes the appointment of an administrator to collect arises from great delay "before letters testamentary or of administration" can be issued, and such appointment extends only until probate of the will of the decedent,

or “until administration of his estate is granted,” when such administrator to collect is required to deliver the estate in his hands to the “proper” executor or administrator.

Under section 12 the prescribed form of letters to be granted to the person appointed to collect the estate of the decedent, states, as the occasion for such appointment, that “the administration whereof cannot be immediately granted to the persons by law entitled thereto.”

In section 15 such appointee is denominated a “collector,” and it is provided that he may be allowed a commission upon the amount of the estate actually collected and delivered to the “proper” executor or administrator, as aforesaid. In section 17 such appointee is styled a “collector.”

While the question involved is not altogether free from doubt, we are disposed to hold that the interpretation placed by the trial court upon the phrase “letters as aforesaid,” employed in the seventh clause of section 70, should prevail, as being more nearly in conformity with the expressed intention of the Legislature than is the interpretation contended for by appellant.

That is to say, the phrase “letters as aforesaid” should properly be interpreted as referring only to letters testamentary granted after probate of a will, or to letters of administration in due course granted on the estate of a decedent.

The judgments will be affirmed.

Judgments affirmed.

 Ryan v. McArdle, 188 Ill. App. 584.

S. D. Ryan, Appellee, v. Thomas E. McArdle, Appellant.

Gen. No. 19,324. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed October 7, 1914.

Statement of the Case.

Action by S. D. Ryan against Thomas E. McArdle to recover instalments of rent from October 1, 1906, to September 1, 1910, alleged to be due by the terms of a lease. A trial by the court resulted in a finding and judgment against defendant for \$1,845. To reverse the judgment, defendant appeals.

Plaintiff in a former suit brought in the County Court to recover \$795.52 salary and instalments of rent alleged to be due under the same lease from September 1, 1905 to October 1, 1906, recovered a judgment against defendant for \$472.50, which judgment was affirmed by the Appellate Court. See *Ryan v. McArdle*, 159 Ill. App. 579.

In the present suit the proceedings in the former suit were incorporated in plaintiff's statement of claim and the complete record in the former suit, including the opinion of this court on the former appeal and its mandate affirming the judgment, were introduced in evidence.

The bill of particulars filed by the plaintiff in the former suit is as follows:

"Salary and rent from September 1, 1905, to	
January 6, 1906.....	\$ 630.00
Rent from January 6, 1906, to October 1,	
1906	660.00
	<hr/>
	\$1,290.00
Credit.	
By cash on account.....	\$494.48
	<hr/>
Balance due on October 1, 1906.....	\$795.52"

The principal claim of plaintiff in the present suit is stated in his statement of claim filed herein as follows:

“Par. 15. That after the beginning of this (the) suit in the preceding paragraphs mentioned (being the former suit on the County Court) there has accrued due to the plaintiff from the defendant as rent under the agreement herein and in said sum pleaded rent at the rate of \$75 per month from the first of October, 1906, to the 30th of August, 1910, 47 months, making an aggregate of \$3,525.00.

“Par. 16. That the plaintiff has received as a credit on said \$3,525.00, by re-renting the premises in said agreement leased for the account of said defendant sums aggregating \$1,680.00, and no more, as follows, viz.:

“From 1st of October, 1906, to 30th of September, 1907, at \$50 per month.....	\$1,200.00
“From August 26, 1909, to February 25, 1910, at \$30 per month.....	180.00
“From February 26, 1910, to August 26, 1910, at \$50 per month.....	300.00
	<hr/>
	\$1,680.00

Leaving a balance of \$1,845.00 due the plaintiff.”

Defendant’s affidavit of merits averred, as a ground of defense to the whole of plaintiff’s claim, that on or prior to October 1, 1906, the plaintiff repossessed himself of the premises so as to constitute an eviction, and further averred that the defense of eviction in the former suit was successfully made, and that the judgment was *res adjudicata* as between plaintiff and defendant that the defendant had been evicted.

MONTGOMERY, HART & SMITH, for appellant.

McARDLE & McARDLE, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Berenzweig v. Krecun, 188 Ill. App. 586.

Abstract of the Decision.

1. STATUTES, § 272*—*necessity of pleading foreign statutes.* Laws of other States are required to be pleaded and proved in the courts of this State as facts.

2. JUDGMENT, § 517*—*when former judgment in suit for rent res adjudicata on question of eviction.* A recovery of rent in a former action held *res adjudicata* on the question whether the tenant had been evicted from the premises by the landlord reletting the premises so that the defense of eviction could not be availed of by the tenant in a subsequent suit to recover further instalments of rent, where it appeared from the record of the proceedings in the former suit and also in the opinion of the Appellate Court on an appeal from such judgment that recovery was had for the period during which the tenant claimed the eviction took place.

Esther Berenzweig, Appellee, v. Abe Krecun, Appellant.

Gen. No. 19,355. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed October 7, 1914.

Statement of the Case.

Action by Esther Berenzweig against Abe Krecun instituted in the Municipal Court, March 13, 1912, to recover damages for alleged breach of a promise to marry. From a judgment entered on a verdict in favor of plaintiff, defendant appeals.

Appellant urges as ground for reversal that the verdict is unsupported by the evidence; that the suit was prematurely brought; that under the pleading it was necessary for appellee to prove that she requested performance of the alleged marriage contract

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

and that appellant refused to perform, and no such proof was made.

Appellee's statement of claim was as follows:

"For that whereas on or about the 15th day of 1912, in the City of Chicago, County of Cook and State of Illinois in consideration that the plaintiff, being then unmarried, had then and there promised defendant, at his request, to marry him, when she, the plaintiff, should be thereto requested, the defendant promised the plaintiff to marry her, and the plaintiff avers that she, confiding in the said promise of the defendant has always from thence hitherto remained and still is unmarried and has been for all the time aforesaid and still is ready and willing to marry him. That although plaintiff, after making of said promise of the defendant on the day aforesaid, has requested the defendant to marry her, the defendant did not nor would he then marry the plaintiff, but refuses so to do, whereby the plaintiff has sustained damages to the extent of the sum of \$5,000."

The affidavit of merits filed by appellant stated his defense as follows: "That defendant never at any time promised to marry the plaintiff."

B. M. SHAFFNER, for appellant.

BLUM & BLUM and NATHAN S. SCHOENBROD, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. PLEADING, § 117*—*when undented facts are admitted.* It is a fundamental rule in pleading that a material fact asserted on one side and not denied on the other is admitted.

2. PLEADING, § 117*—*when facts not put in issue are admitted.* In a suit to recover damages for breach of a promise of marriage, where under the pleadings the only material fact in issue was whether defendant made such promise, *held* that upon proof by

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Devine v. Ward Baking Co., 188 Ill. App. 588.

plaintiff of such promise, plaintiff's allegations of her request to defendant to marry her and of his refusal to do so were admitted.

3. BREACH OF MARRIAGE PROMISE, § 23*—*when issue properly submitted to jury.* In a suit for breach of a promise to marry, where plaintiff's evidence tended to show that defendant promised in December to marry her the following May and that she expressed her willingness to then marry him, and defendant's evidence tended to show that he did not so promise to marry plaintiff, *held* that the case was properly submitted to the jury on such issue and that a verdict for plaintiff was sustained by the evidence, it appearing that the facts and circumstances in evidence, other than direct testimony of the parties, tended to corroborate the plaintiff rather than the defendant.

4. APPEAL AND ERROR, § 370*—*when objection that suit was prematurely brought will not be considered.* An objection that the suit was prematurely brought cannot be raised for the first time in the Appellate Court.

John F. Devine, Administrator, Appellee, v. Ward Baking Company, successor to Ward-Corby Company, Appellant.

Gen. No. 19,367. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed October 7, 1914. Rehearing denied October 19, 1914.

Statement of the Case.

Action by John F. Devine, administrator of the estate of William Lesak, deceased, against Ward Baking Company, successor to Ward-Corby Company, to recover damages for the wrongful death of plaintiff's intestate caused by being struck by an electric truck belonging to defendant. The plaintiff's intestate, who was eight years and nine months old, was playing in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Devine v. Ward Baking Co., 188 Ill. App. 588.

the street at the time of the accident. Plaintiff had verdict and judgment for forty-five hundred dollars. To reverse the judgment, defendant appeals.

The declaration contained two counts. The first count alleged that defendant owned, operated and controlled a certain motor car, and by its servant and agent was operating the same over, upon and along Parnell avenue; that it became and was the duty of defendant in operating said car along said street to use all proper care and caution in the running of said car, so as not to injure persons on said street; that defendant did not regard its duty in that behalf, but on, etc., while plaintiff's intestate was lawfully on said street, and was in the exercise of proper care for his own safety, defendant, regardless of its duty in that behalf, carelessly, negligently and wrongfully ran, operated and managed said car in so careless and negligent manner and at a high and dangerous rate of speed, so that by reason thereof plaintiff's intestate was run into, against, knocked down and run over by said car in charge of defendant's servant and thereby so badly injured that he died immediately as a direct result of said injuries.

The second count was similar to the first count, and also further predicated a right of recovery on the alleged negligent failure of defendant's servant to give proper warning to persons on the street.

DUNCOMBE & BEHAN, for appellant; LOUIS J. BEHAN, of counsel.

GEORGE D. WELLINGTON and ROCKHOLD & BUSCH, for appellee; FRANCIS X. BUSCH, of counsel.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Devine v. Ward Baking Co., 188 Ill. App. 588.

Abstract of the Decision.

1. **DEATH, § 50b***—*when evidence sufficient to show death resulted from injuries.* In an action for the death of a boy alleged to have been caused by being run over by defendant's motor truck in a public street, evidence *held* sufficient to show that death resulted from the injuries, where the identity of the boy was clearly established, and though the character and extent of the injuries were not shown, the evidence disclosed that he died within an hour after he was injured, and it also appeared that defendant's counsel in the examination of witnesses assumed that the boy was killed.

2. **MASTER AND SERVANT, § 845***—*when act of driving motor truck is within scope of employment.* Where a servant was engaged to drive an automobile truck for a bakery over a certain route, and contrary to the instructions of his employer made a trip off his route to take a party home, and after having done so was returning to the bakery when he ran over a boy in the street, *held* that at the time of the accident the servant was driving the truck in the regular line of his employment.

3. **AUTOMOBILES AND GARAGES, § 3***—*sufficiency of declaration to admit proof of driving on wrong side of street.* In an action for the death of a boy by being run over in a public street by defendant's automobile truck, *held* that the allegations of the declaration in respect to the negligent operation of the truck were sufficiently broad to admit proof in support of a substantive ground of recovery that at the time of the accident the defendant was driving on the wrong side of the street.

4. **AUTOMOBILES AND GARAGES, § 3***—*when proof of driving on wrong side of street admissible.* In an action for the death of a boy by being run over by defendant's automobile truck in a public street, evidence that the truck was being driven on the wrong side of the street at the time of the accident, *held* properly admitted as bearing on the question of contributory negligence of the boy.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Idaho Sheep Company, Appellee, v. Oregon Short Line
Railroad Company, Appellant.**

Gen. No. 18,308.

1. CARRIERS, § 60*—*when delivery of bill of lading passes title.* Delivery of a bill of lading with intent to transfer the property in the goods is a symbolical delivery of the goods and passes a valid title thereto.

2. CARRIERS, § 43*—*when liability for shipment becomes fixed under Carmack Amendment.* Under the Carmack Amendment to section 20 of the Interstate Commerce Act, it is the receiving of the goods for transportation to a point in another State that fixes the carrier's liability for damage or loss caused by itself or by any connecting carrier; the carrier cannot defeat its liability by neglecting or refusing to issue a receipt or bill of lading in compliance with the act.

3. CARRIERS, § 139*—*proof essential to show right of action for damage to shipment.* In an action against a carrier to recover for loss or damage to a shipment, where the evidence shows a bill of lading was issued, it devolves upon the plaintiff to prove that he is the legal holder of the bill of lading; but where no such bill of lading was issued, ownership of the goods or the right to maintain the suit must of necessity be proved otherwise.

4. CARRIERS, § 50*—*nature of bill of lading.* A bill of lading is both a receipt and a contract to carry.

5. CARRIERS, § 107*—*when oral evidence of a contract of shipment should be excluded.* In an action against a carrier for damages resulting from a delayed shipment, where it was disclosed that plaintiff had signed a contract of shipment but the contract was not produced in court or its absence accounted for, and the plaintiff sought to rely wholly upon a verbal contract entered into prior to the signing of the written one, *held* that the court erred in overruling a motion at the close of the evidence to exclude all the oral evidence of the contract, on the ground that the contract itself was the best evidence and the only contract in the case.

6. CARRIERS, § 159*—*power of carrier to limit liability under Carmack Amendment.* The Carmack Amendment to section 20 of the Interstate Commerce Act does not prohibit a carrier from making a fair, open and reasonable agreement specifying a time in which a shipment may be delivered and limiting the amount recoverable by the shipper.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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7. CARRIERS, § 110*—*measure of damages for delayed shipment.* Unless otherwise legally limited by the contract to carry, the measure of damages by reason of a delayed shipment is the difference between the market value of the consignment at the time and in the condition it should have arrived and its fair, cash market value in the condition and at the time it actually did arrive at destination, plus the necessary expense to the shipper caused by the unusual delay.

8. CARRIERS, § 235*—*when not liable for damages resulting from stopping shipment of stock.* Where a carrier is already liable for damages resulting from delay in a shipment of lambs, it cannot be required to take the risk of further damages by stopping the shipment before reaching destination for the purpose of feeding the lambs for a future market, but where the shipment is thus stopped the carrier is entitled to the benefit of any reduction of the actual loss to the shipper that might thereby be occasioned.

9. CARRIERS, § 248*—*sufficiency of proof for an estimate of damages resulting from delayed shipment of stock.* In an action against a carrier for damages resulting from a delayed shipment of lambs where, owing to the delay, the shipment was stopped en route to be fed for a future market and later shipped to the original destination and sold, *held* that the proof in the record was too indefinite for an accurate estimate of the proper damage, and in view of a new trial the character of the proof and method of computation was suggested.

Appeal from the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1912. Reversed and remanded. Opinion filed October 7, 1914.

DAVIS & RANKIN, for appellant; EDMUND P. KELLY, of counsel.

CHARLES A. BUTLER, for appellee.

MR. JUSTICE DUNCAN delivered the opinion of the court.

Idaho Sheep Company prosecuted this suit against appellant, Oregon Short Line Railroad Company, as the initial carrier in an interstate shipment of 2,994 lambs from Soda Springs, Idaho to Chicago, and recovered a judgment of \$3,099.86.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Appellant in August, 1906, agreed to deliver by October 4, 1906, at Soda Springs cars for said shipment of lambs by appellee, but failed to deliver the same until November 7, 1906. By reason of said failure appellee caused the lambs to be removed from the range in Idaho and placed in pastures, cared for and fed, pending shipment, at an extra expense to it of about \$300. The lambs were routed, loaded and shipped by appellee at Soda Springs by way of appellant's road to Chicago, November 7, 1906, in good, fat condition and weighing on an average about 67 pounds per lamb. All the lambs arrived at Kirkland, Illinois, November 16, 1906, about ten o'clock, p. m., after a continuous run of almost forty hours from the last previous stop and rest, looking tired and gaunt, none of them killing lambs, and weighing not exceeding 58 pounds per lamb. Had they continued right along with the proper stop, rest and feed at Kirkland, they would have arrived in Chicago, November 19th or 20th, weighing on an average about 57 pounds, all of them feeders and none of them killing lambs, and 500 of them would have sold on the Chicago market at those times at \$6.10, and the others at \$6.60 per cwt. They were in good, fat condition for the market from October 4, 1906, to October 19, 1906, and at those times weighed 70 lbs. per head. Had they been shipped October 4th and properly cared for en route and promptly delivered ninety per cent. of them would have been delivered in Chicago as good Idaho, well-bred, killing lambs weighing 65 lbs. per lamb on an average, and ten per cent. thereof would have been delivered as good, well-bred, Idaho feeders weighing about 65 lbs. per head. Had they been so shipped October 19th, and so cared for, they would have been delivered in Chicago, seventy-five per cent. thereof as killing lambs and twenty-five per cent. thereof as feeders, and weighing near 65 lbs. per lamb. The usual time in transit for such shipments from Soda Springs to Kirkland and

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from Soda Springs to Chicago is about seven and eight days respectively, and the usual shrinkage for the eight days in transit is about 5 lbs. per head when properly cared for and fed. The cash market value in Chicago of Idaho killers, such as the lambs in question, was on October 12, 1906, \$7.65, and on October 16th, \$7.55 per cwt. The cash market value in Chicago of such lambs as feeders on October 12th was \$6.60, and at any time from October 12, 1906, to February 28, 1907, such feeders would not have sold for more than \$6.75 per cwt. The lambs were badly treated en route by being stopped and fed at some stops with very poor feed in very muddy pens and were given bad water, and at times in troughs too high for the lambs to drink from, and thereby they lost heavily in flesh; and a number of other lambs died en route, but they were not included in the statement of claim. Appellee had the lambs all placed on good pastures at Kirkland, November 17, 1906, and as soon thereafter as it was safe to do so they were put on good feed there and fattened for the market, and as rapidly as they became killing lambs they were promptly shipped to Chicago and sold as killers from January 27th to February 27, 1907, except a few dead and cripples. They weighed on an average near 82 lbs. per lamb with their increase in growth and flesh. The 2,994 lambs were all sold at from \$7.40 to \$7.70 per cwt., except the crippled, dead and other objectionable ones that sold at from 50 cents to \$4 per head. The lambs were brought to Chicago on the same billing on which they left Soda Springs; and the gross proceeds of the sales thereof amounted to \$18,196.04. The total expense therefor for care, feed and pasture at Kirkland was about \$5,842.75.

Appellee alleged and claimed damages for the failure of appellant to safely carry and deliver the lambs within a reasonable time after receipt thereof, and for its failure to furnish cars and to safely deliver the

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lambs in good order and condition as it agreed to do.

Appellant entered a general denial, and averred that appellee was a foreign corporation without a license, was transacting and had transacted its business in this State without a license and, therefore, could not maintain its suit, but in its argument has abandoned its affirmative defense.

In addition to the undisputed facts above recited, R. W. Phillips, agent of appellee in making the shipment at Soda Springs, testified, without contradiction, as follows:

“After loading the sheep I told Mr. Strahan, depot agent of appellant, to bill these sheep to the Knollin Sheep Co., Chicago, and gave him the routing. He gave me a contract to sign after that conversation. I signed it ‘Idaho Sheep Co.’ by myself. I got a copy of it and it was given to my men that accompanied the sheep (to Kirkland). He (Strahan) signed them and kept a copy and gave me one. I made no objections to signing it. I don’t know of ever reading one of them word for word. I know in a general way the contents of that document I signed November 7th, and had at that time.”

This suit is controlled by that portion of the Carmack Amendment to section 20 of the Interstate Commerce Act, which provides as follows:

“That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.”

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The said act declares the initial carrier's liability for loss and damage to interstate shipments, and that legislation supersedes all regulations and policies of any particular State upon the same subject. The proviso above quoted related to remedies existing under Federal law and not to any State law. *Adams Exp. Co. v. Croninger*, 226 U. S. 491.

The right of action is in positive terms of said amendment given to the lawful holder of the receipt or bill of lading, and it requires the carrier to issue the same. These provisions are sound and simple and need little or no explanation. The owner of the bill of lading was regarded in law as an owner of the goods or the thing shipped before the Carmack Amendment was ever enacted. The lawful holder of the bill of lading, even by assignment or by mere delivery thereof with intent to transfer the goods, has at all times been regarded as having the right to the possession of the goods shipped, and property rights therein according to the intent of the parties to the assignment or delivery, and could maintain an action for the possession of the same. Delivery of a bill of lading with intent to transfer the property in the goods is a symbolical delivery of the goods and passes a valid title thereto. *Lewis v. Springville Banking Co.*, 166 Ill. 311; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Peters v. Elliott*, 78 Ill. 321; *Taylor v. Turner*, 87 Ill. 296.

It is the receiving of the goods for transportation to a point in another State, however, that fixes the carrier's liability under the Carmack Amendment for damage or loss caused by itself or by any connecting carrier. It cannot defeat its liability by neglecting or refusing to issue a receipt or bill of lading in compliance with that act. *Gamble-Robinson Commission Co. v. Union Pac. R. Co.*, 262 Ill. 400; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186; *International Watch Co. v. Delaware L. & W. R. Co.*, 80 N. J. Law 553.

If a bill of lading, however, is issued by the carrier, as the said act requires, the lawful holder thereof is the one given the right of action for loss or damage as aforesaid; and if the existence of such a bill of lading is shown it will devolve upon the plaintiff to prove that he is the legal holder thereof. Where no such bill of lading is issued, ownership of the goods or right to maintain the suit must of necessity be proved otherwise, but the carrier in such case cannot defeat the suit by the showing that no such bill of lading or receipt was issued.

A bill of lading is both a receipt and a contract to carry. *Merchants' Despatch Transp. Co. v. Furthmann*, 149 Ill. 66.

The evidence in this case tends to prove that a bill of lading was issued by appellant for the lambs shipped by appellee, but there is no evidence as to its contents and it does not appear in the record who was the legal holder of it at the time the suit was brought. It positively and clearly appears from the record that appellee and appellant signed a written contract, and presumably a contract to carry the lambs. That contract was not produced in court or its absence accounted for, but appellee sought to rely wholly upon the verbal contract or undertaking with appellant with reference to said shipment entered into by them prior to the signing of the written contract.

When the evidence disclosed that there was a bill of lading, or a written contract to carry, entered into by the parties, appellant moved to exclude all the oral evidence of a contract to carry the lambs on the express grounds that the said contract itself was the best evidence thereof and the only contract in the case. The court overruled the motion, stating, in substance, that the evidence did not show that there was a written contract, and in that ruling the court erred. The motion was made at the close of all the evidence to exclude the evidence in the record and to instruct

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the jury to return a verdict of not guilty, and that motion was overruled and proper exceptions preserved by appellant to said rulings.

The burden was upon appellee to prove the contract upon which the shipment was made by proper and legitimate evidence, by the best evidence of which the case was susceptible. There can be no question that the best evidence of a written contract is the writing itself. The bill of lading when signed by the parties is the evidence of the contract. *Gamble-Robinson Commission Co. v. Union Pac. R. Co.*, *supra*.

When the motion is made to exclude all the evidence and to direct a verdict at the close of the evidence, the question for the court then is, is there any legal evidence in the whole record which tends to prove the material allegations of the declaration, or the ultimate facts necessary to establish the plaintiff's case. If so, the case should be submitted to the jury. If not so, then the court should direct a verdict for the defendant. *Libby, McNeill & Libby v. Cook*, 222 Ill. 206.

The right to have that question reviewed in this court cannot be said to be waived by appellant by failing thereafter to object to an instruction as to the measure of damages.

Moreover, appellee has placed itself in the attitude of suing on a verbal contract to carry that had no existence. The written contract superseded the oral contract, and is the only contract between the parties. It was bound to rely on the written contract for recovery when the evidence disclosed its existence, and was bound to produce it, or account for its loss or appellee's inability to produce it, and prove its contents by oral evidence. *Kitza v. Oregon Short Line R. Co.*, 169 Ill. App. 609, and cases there cited; *Burtless v. Oregon Short Line R. Co.*, 180 Ill. App. 249.

It is argued by appellee that the Carmack Amendment prohibits the carrier from exempting itself against the liability thereby imposed by contract, re-

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ceipt, rule or otherwise and that, therefore, it can make no difference as to what was contained in the contract. We cannot accede to this view. The carrier cannot exempt itself from liability for its own negligence or that of its employees, but it can by a fair, open and reasonable agreement specify a time in which the shipment may be delivered and limit the amount recoverable by the shipper without violating that act. *Adams Express Co. v. Croninger, supra*; *Chicago, B. & Q. Ry. Co. v. Miller*, 226 U. S. 513; *Chicago, St. P., M. & Q. Ry. Co. v. Latta*, 226 U. S. 519; *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639.

Appellee is shown by the evidence to have known the substance of its contract, and under the decisions of the Federal Courts that govern this case it is presumed to know the provisions thereof, and the presumption must be indulged that it was a binding contract. *Kansas City Southern Ry. Co. v. Carl, supra*; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508; *Missouri Pac. Ry. Co. v. Harper Bros.*, 121 C. C. A. 570, 201 Fed. 671.

There is much argument concerning the proper measure of damages, and the court's instructions thereon. No correct rule can be given until appellee has presented its case under its contract. Unless otherwise legally limited by the contract to carry, the measure of damages by reason of a delayed shipment is the difference between the market value of the consignment at the time and in the condition it should have arrived and its fair, cash market value in condition and at the time it actually did arrive at its destination (or in this case when it would have arrived had it continued right on after proper rest at Kirkland), plus the necessary expenses to the shipper caused by the unusual delay. Appellant in this case could not be required to take the risk of further damages by stopping the shipment at Kirkland and feeding the lambs to make them killers for a future market, in case that caused a greater loss. But inasmuch as they were

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stopped and fed for a future market by appellee, appellant would be entitled to the benefit of any reduction of the actual loss to appellee that might thereby be occasioned, as appellee could not recover more than his actual loss and damage.

As the case must be retried, we further suggest that the proof in this record is too indefinite for an accurate estimate of the proper damages, even supposing that under the contract the measure of damages above suggested shall properly apply. The actual number of lambs and sheep shipped by appellee November 7th was about 5,200, 3,675 of which were lambs, 560 of which seem to have been sold en route, and about 121 lambs appear to have died en route. Appellee sued for loss and damage to only 2,994 lambs and cannot under his statement of claim recover for more than that number. The evidence should accurately show the necessary expenses incurred by appellee for the lambs sued for while waiting for the delivery of the cars for shipment after October 4th. It should also show what the 500 would have averaged in weight on the market that would have sold as feeders on the market at \$6.10, and also what the others would have averaged in weight that would have sold for \$6.60 as feeders, on November 19th or 20th. In fact, when average weight of all the lambs is proved for any time, it should be of the 2,994 sued for and not of the 3,675. Then after obtaining the amount of damages on the supposition that they were sold on the market November 19th and 20th, as feeders, those damages should be mitigated further by any gain, if any, over the market of November 19th and 20th by feeding them and selling them as killers in January and February, 1907. In ascertaining that gain, if any, from the total proceeds of sales of the lambs, \$18,196.04, less \$5,842.75 expenses, should be deducted the proceeds of sales of the lambs that would have been realized had they been sold November 19th and 20th. This result

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might be still varied, and apparently should be varied, by considering the fact that had the lambs been properly rested, watered and fed at Kirkland, and then have continued right along to Chicago, it would have been at an additional expense to appellee for such watering and feeding, the probable amount of which was not proved. In other words, that amount should be deducted from the supposed sales of November 19th or 20th to ascertain the amount appellee would have realized on such sales.

For the errors indicated the judgment of the court is reversed and the cause remanded.

Reversed and remanded.

Clark Aubrey, Appellee, v. Charles C. O'Byrne, Executor, Appellant.

Gen. No. 18,862. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Affirmed. Opinion filed October 7, 1914.

Statement of the Case.

Action in assumpsit by Clark Aubrey against Charles C. O'Byrne, executor of the estate of Jessie S. Donley, deceased, to recover money which the deceased had deposited in a bank and which plaintiff claims he is entitled to by virtue of a gift *causa mortis*. Plaintiff recovered a judgment for \$1,924.04. To reverse the judgment, defendant appeals.

The case was tried upon an agreed state of facts, in substance, that on November 13, 1908, Jessie S. Donley had on deposit to her credit with the Citizens State Bank of Big Rapids, Michigan, the sum of \$1,924.04; that on that day she had been informed that she was about to die and could not recover, and she believed

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she was about to die; that the plaintiff, Clark Aubrey, was her nephew and her only heir at law, except her husband, William E. Donley; that she did not then know the exact amount of money she had in the said bank and she thereupon, on said date, executed her check in these words:

“No. ——— Big Rapids, Mich., Nov. 13, 1908.

Citizens State Bank, Pay to Clark Aubrey or order \$5,000 Dollars.

JESSIE S. DONLEY.”

She forthwith delivered said check to said Clark Aubrey without any valuable consideration therefor, and by the execution and delivery thereof she intended to assign to Clark Aubrey as a gift all her right, title and interest in said sum of money then on deposit in said bank to her credit; that about the same time she drew said check she also made her will in which no mention was in any way made of said sum of money deposited in said bank, and said check was made and delivered in contemplation of her impending death; that within three hours after the execution and delivery of said check to Aubrey she died; that said check was never previous to her death presented to said bank for payment or accepted by it at any time, and after her death it refused at all times to pay said check to said Aubrey; that appellant was on March 29, 1909, appointed executor of the estate of said deceased by the Probate Court of Mecosta County, Michigan, which said court had jurisdiction of probate matters in said county and State, and had jurisdiction of the said estate; and that appellant, as such executor, obtained said money from said bank and refused to pay the same to appellee on his demand therefor.

MORSE IVES, for appellant.

ROSE, SYMMES & KIRKLAND, for appellee.

MR. JUSTICE DUNCAN delivered the opinion of the court.

Junge v. South Halsted St. Iron Works, 188 Ill. App. 603.

Abstract of the Decision.

1. EVIDENCE, § 33*—*presumption in the absence of proof of the laws of another State.* In the absence of any proof in support of a special plea averring the law of another State, it will be presumed that the common law prevails in that State and that the decisions of the courts of this State embody a correct exposition of the common law as it prevails in that State.

2. BANKS AND BANKING, § 126*—*when drawing of check operates as assignment of funds on deposit.* Under the common law in this State the drawing of a check upon a banker by a drawer having funds in his bank operates as an assignment to the drawee of the legal title to so much of the fund on deposit as is named in the check, as between the drawer and drawee; but in order to charge the bank with the amount of the check, it is necessary that the check be presented for payment, or some other act equivalent thereto, and that it be shown that the drawer had at the time of presentment sufficient funds to pay the check.

3. GIFTS, § 32*—*when delivery of check constitutes gift causa mortis of deposit.* A delivery by a donor of a check for a greater sum than was on deposit in the bank with intent to transfer and deliver the deposit and no more, *held* to constitute a completed gift *causa mortis* of the amount of the deposit, and to entitle the donee to maintain an action against the executor to recover the same where the latter wrongfully withdrew it from the bank.

4. GIFTS, § 36*—*authority to revoke gift causa mortis.* After a delivery of a gift *causa mortis* to the donee by the donor, and after the death of the donor without revoking the gift, the legal representatives and heirs have no power or authority to revoke the gift.

**William Junge, Appellee, v. South Halsted Street
Iron Works, Appellant.**

Gen. No. 18,884. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. PAUL McWILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Affirmed. Opinion filed October 7, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Junge v. South Halsted St. Iron Works, 188 Ill. App. 603.

Statement of the Case.

Action by William Junge against South Halsted Street Iron Works, a corporation, to recover for personal injuries sustained by plaintiff while unloading structural iron from a wagon. To reverse a judgment in favor of plaintiff for sixty-five hundred dollars, defendant appeals.

The facts showed that plaintiff was a structural iron worker of twenty years experience and had been in defendant's employment for about six weeks prior to his injury. Plaintiff was put to unloading structural iron from wagons at a place where a building was in course of construction. The iron which plaintiff was unloading was slippery because of wet paint thereon, and plaintiff, on Friday or Saturday before his injury on the following Monday, notified the foreman that he would quit his job if the iron continued to come wet and slippery. The foreman replied: "Well, we will see. I will telephone and see that we get it remedied, so that we do not get any more stuff like that." Plaintiff relying on the promise continued work and received his injury while unloading the next load. It appeared that plaintiff and one Stream were directed by the foreman to unload the wagon in question. They went to the wagon and first removed a loose chain from around it, and looked at the iron or steel and touched it with their hands to see if it was dry and safe, and remarked to each other that it was dry and looked good. They then removed from the top of the load the small T-iron, the paint on which was dry. The load of steel extended above the short stakes or standards on the bolsters of the wagon and above the wheels. Mr. Stream was looking for a bar to pinch off the heavy pieces while plaintiff got on top of some smaller irons piled on an elevated place by the side of the wagon to straighten them out so the heavy iron could be unloaded on top of them without bending any of the

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iron. While plaintiff was thus at work, about four feet from the wagon and about opposite the hind wheels, there was suddenly a slight jar or move of the wagon and at the same instant a large lintel, about eighteen inches wide on its base and from fourteen to sixteen feet long, "shot out from the load" and almost cut off one of his feet. Mr. Stream gave plaintiff warning just as the lintel started, but the warning was too late. The lintel in question was slightly tilted out of the horizontal position, and its broad face or bottom was faced up close against the face or bottom of a similar lintel. The paint on the outside of those two lintels looked to be dry but their two faces that were touching each other were wet and slippery, because the paint had not been dried before they were loaded. The witnesses described them as "slippery as soap," and attributed the sliding of the lintel the distance it was thrown to that slippery condition, which overcame the friction that would otherwise have held them together. They were not able to say whether it was a move of the team or the movement of the lintel as it went out of the wagon that caused the sudden move or jar of the wagon.

H. L. HOWARD, for appellant.

HAYDEN N. BELL and FRANK O. CAMPE, for appellee.

MR. JUSTICE DUNCAN delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 398*—*assumption of risk*. A structural iron worker injured while unloading iron on account of its slippery condition resulting from wet paint, *held* not to have assumed the risk, where shortly before receiving the injury he notified the foreman of his intention to quit his job unless the danger was removed, and he received a promise of the foreman that the danger would be

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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removed and relying on such promise he continued to work, it also appearing that the load of iron which he was unloading at the time of the injury appeared to be dry and to indicate that the promise had been complied with.

2. MASTER AND SERVANT, § 559*—*when filing general issue only admits ownership of instrumentality complained of.* In an action by a servant against his master for personal injuries where the defendant filed only the general issue to plaintiff's declaration, *held* that the ownership of this instrumentality complained of was admitted by the pleadings where the declaration charged defendant had ownership and control thereof.

3. MASTER AND SERVANT, § 701*—*when finding as to proximate cause warranted by the evidence.* In an action by a structural iron worker to recover for personal injuries alleged to have been caused by the slippery condition of the iron by reason of wet paint thereon, while he was unloading the same from a wagon, where defendant claimed that a movement or jar of the wagon caused one of the irons to shoot out from the load, *held* that the evidence warranted the jury in finding that the slippery condition of the iron was the proximate cause of the injuries where it appeared that the iron would not have shot out from the load but for its slippery condition.

4. MASTER AND SERVANT, § 786*—*when instruction may ignore defense of assumption of risk.* An instruction given for plaintiff which ignored the defense of assumed risk, *held* not reversible error where the evidence showed plaintiff did not assume the risk.

5. MASTER AND SERVANT, § 776*—*when instruction as to proximate cause proper.* In an action by an employee for personal injuries alleged to have resulted from the slippery condition of iron, an instruction given for plaintiff which, in effect, told the jury that although some other agency was a contributing cause of the injuries, yet if they believed that the slippery condition of the iron was also a proximate cause, plaintiff's recovery could not be defeated because of the other concurring or contributing cause, *held* proper.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Holslag v. Morse, 188 Ill. App. 607.

E. J. Holslag, trading as Holslag & Company, Appellee, v. Robert H. Morse, Appellant.

Gen. No. 18,925. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY OLSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Reversed and remanded. Opinion filed October 7, 1914. Rehearing denied October 19, 1914.

Statement of the Case.

Action by E. J. Holslag, trading as Holslag & Company, against Robert H. Morse to recover a balance, claimed to be due under a contract for alterations and interior decorations of defendant's home. The declaration was in the usual form with the common counts only, accompanied by an affidavit showing that the claim was for a balance due of \$1,475.72 on a final settlement made by plaintiff and defendant for work, labor, and material furnished under a contract, a copy of which was attached to the declaration. Defendant filed a plea of the general issue with notice of special matters of defense, payment, accord and satisfaction, release and breach of contract. The trial was had by the court without a jury. To reverse a judgment in favor of plaintiff for the full amount sued for, defendant appeals.

JOHN S. LORD, for appellant.

MCARDLE & MCARDLE, for appellee.

MR. JUSTICE DUNCAN delivered the opinion of the court.

Abstract of the Decision.

1. ACCORD AND SATISFACTION, § 3*—*when acceptance of less sum does not discharge debt.* After parties reach a final agreement as

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to the amount due on a claim, the claim is no longer regarded as an unliquidated disputed one, and an acceptance of a less sum in satisfaction thereof by mistake or oversight, which was well known to the creditor, will not discharge the debt or claim in full.

2. **ACCORD AND SATISFACTION, § 3*—when acceptance of less sum not satisfaction.** An acceptance by a creditor of a sum of money less than the amount due on a liquidated debt, even if done by agreement without consideration, is a discharge of only so much of the debt as is thereby paid; the rule is otherwise where property other than money, or money and property, are taken in full satisfaction, or where the payment is the amount agreed upon in an honest compromise of unliquidated or disputed demands.

3. **ACCORD AND SATISFACTION, § 3*—right of creditor to recover balance of liquidated claim after his acceptance of less sum in satisfaction.** Where a creditor accepts a less sum than the amount due in full satisfaction of a liquidated demand, it is not essential to his right of action to recover the balance due that he rescind the contract of settlement or that he return the money received; he is only required to give the debtor credit for the amount paid.

4. **BUILDING AND CONSTRUCTION CONTRACTS, § 69*—when provision requiring architect's certificate waived.** Where the owner asks the architect not to make his final certificate, and makes payments and settles without such certificate, the provisions of the contract requiring such certificate are waived.

5. **BUILDING AND CONSTRUCTION CONTRACTS, § 84*—right of contractor to recover under common counts.** Where the owner and contractor had agreed on the amount due, the contractor may recover from the owner on the common counts, without producing the architect's final certificate, where such certificate was waived by the owner.

6. **BUILDING AND CONSTRUCTION CONTRACTS, § 54*—when acceptance of work not waiver of latent defects.** Latent defects in work under a building contract, not open to inspection, are not waived by the owner's acceptance thereof in ignorance of their existence.

7. **BUILDING AND CONSTRUCTION CONTRACTS, § 57*—power of architect to waive compliance with contract.** An architect has no authority to waive for the owner his right to insist on the character of the work and materials called for in the contract, unless such authority is given by the contract or by the consent of the owner.

8. **SET-OFF AND RECOUPMENT, § 17*—when claim may be recouped.** A claim for unliquidated damages is not properly a matter of set-off, strictly speaking, but it may be recouped in an action growing out of the same contract or subject-matter, i. e., such claim may be allowed to lessen plaintiff's claim, or entirely defeat it, but not

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jones v. Roberts, 188 Ill. App. 609.

allowed so as to enable defendant to recover a judgment for any excess in his favor.

9. BUILDING AND CONSTRUCTION CONTRACTS, § 95*—*when refusal to permit examination of work is circumstance discrediting owner's claim of defective work.* In an action for a balance due for work and materials furnished in decorating defendant's house, where defendant claimed that the work and materials did not comply with the contract, and defendant upon the trial refused a request of plaintiff's counsel to permit plaintiff or an expert to examine the work with a view of obtaining evidence to rebut defendant's claim for damages, *held* that such refusal should be considered by the court or jury as a circumstance or act discrediting defendant's claim of defects in the work.

Charles A. Jones, Appellee, v. Mary Roberts, Appellant.

Gen. No. 18,944.

1. LANDLORD AND TENANT, § 311*—*matter which may be recouped in suit for rent.* In an action for rent the tenant is entitled to recoup damages for fraud and deceit in connection with the making of the lease.

2. MUNICIPAL COURT OF CHICAGO, § 27*—*when bill of exceptions may be stricken.* A bill of exceptions may be stricken where it was not filed within sixty days after the judgment was entered, or within the extended time given by the court within said sixty days, as provided by section 38 of the Municipal Court Act, J. & A. ¶ 3350.

3. MUNICIPAL COURT OF CHICAGO, § 27*—*necessity of bill of exceptions.* A judgment of the Municipal Court striking a statement of claim or an affidavit of defense from the files and entering judgment by default must be affirmed in the absence of a bill of exceptions.

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Affirmed. Opinion filed October 7, 1914.

OSCAR E. LEINEN, for appellant.

HERMAN W. STILLMAN, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jones v. Roberts, 188 Ill. App. 609.

MR. JUSTICE DUNCAN delivered the opinion of the court.

Mary Roberts, appellant, brought suit against appellee, Charles A. Jones, to recover the sum of \$910 alleged to have been expended for necessary repairs on the building at 5538 and 5540 Cornell avenue, Chicago. Appellee later sued appellant for rent due on said premises. Both parties filed statements of claim and affidavits of defense in said suits according to the Municipal Court practice in fourth-class actions, and by agreement the two causes were consolidated for trial. Appellant's defense to appellee's suit as stated was recoupment for fraud and deceit in connection with the making of a lease to her of said premises by him, charging that the electric wiring system in said house was very defective and had been condemned and ordered removed from the premises by the city authorities prior to her lease; that the plastering therein had been greatly damaged by an explosion in the adjoining building and was simply held in place by the wall paper; that water could not be had therein above the second story, all of which was well known to appellee before making the lease; that he knowingly and falsely represented to her that said building was in good repair in all the foregoing particulars; that she relied thereon and expended about \$6,000 in fitting up the building for a hotel, and was deceived, defrauded and damaged in said sum, and that all of said defects were latent and not discoverable by ordinary efforts, etc. On motion of appellee her statement of claim in her suit and her affidavit of defense to appellee's suit were stricken from the files as insufficient in law, and judgment was rendered for appellee against appellant by default in the sum of \$1,079.20.

A motion of appellee to strike the bill of exceptions herein from the record has been heretofore sustained by this court because it was not filed within sixty days after the judgment was entered, or within the extended

time given by the court within said sixty days, as provided by section 38 of the Municipal Court Act (J. & A. ¶3350). *Haines v. Knowlton Danderine Co.*, 248 Ill. 259.

The motion of appellee to affirm the judgment made at the same time was overruled upon the supposition that the alleged errors might be shown upon the face of the record. The sole questions, however, upon this appeal are as to whether or not the court erred in striking appellant's statement of claim and her affidavit of defense from the files and in entering judgment against her by default. It is now well established by the courts of this State that an independent suit for fraud and deceit can be maintained by a tenant affirming the contract of leasing, or that the tenant may recoup his damages so sustained in a suit by the lessor for the rent, and no reason appears in this record why appellant should not have been allowed to make her defense in recoupment in this case. *Burroughs v. Clancey*, 53 Ill. 30; *Chicago Legal News Co. v. Browne*, 5 Ill. App. 250; *Stubblefield v. Soule*, 21 Ill. App. 154; *Burroughs v. Selleck*, 185 Ill. App. 446.

The alleged errors of the court cannot be considered, however, for want of a valid bill of exceptions. A motion to strike a pleading from the files, the court's decision thereon and an exception thereto, must in a common-law case appear by a bill of exceptions to give the reviewing court the power to review such decision of the trial court on errors assigned. *Gaynor v. Hibernia Sav. Bank*, 166 Ill. 577.

The same rule announced in the *Gaynor* case, *supra*, must necessarily apply where the reviewing court is asked to reverse a judgment of the Municipal Court in a first-class case striking either a statement of claim or an affidavit of defense from the files and entering judgment by default. It must be presumed in the absence of a bill of exceptions, as said in the *Gaynor* case, that a proper case was made for the order of

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the lower court, and the judgment will, therefore, be affirmed.

Affirmed.

John F. Devine, Administrator, Appellee, v. Grand Trunk Western Railway Company and Patrick J. Forbes, Appellants.

Gen. No. 18,979.

1. **MASTER AND SERVANT, § 222***—*when railroad liable for death of switchman resulting from negligent order.* Where a foreman of a switching crew ordered certain cars standing on a switch track to be switched on another switch track, and after the engine had removed them from the track on which they were first standing the foreman changed his order and signaled for one of the cars to be “kicked” back on the same track, and the car so “kicked” back ran over and killed a member of the switching crew who was waiting for the cars to be switched on the other track and had no knowledge of the change in the order, *held* that the switchman’s death was caused by the negligent order of the foreman as vice principal, and that the fellow-servant rule and the doctrine of assumed risk were inapplicable to the case.

2. **MASTER AND SERVANT, § 221***—*when foreman and employer jointly liable.* Where a foreman of a switching crew gives a negligent order in violation of a common duty owed by the railroad company and himself to another switching employee, both the foreman and the railroad company are joint tort feorsors, and are jointly liable.

3. **DEATH, § 50b***—*when proof on subject of due care sufficient in absence of eyewitness.* In an action against a railroad company to recover for the wrongful death of a switchman, where there was no eyewitness of the accident or what the switchman was doing at and just before he was killed, evidence on the question of ordinary care *held* sufficient to sustain a verdict, where witnesses testified that he was a competent, sober and careful switchman and that such was his reputation.

4. **DEATH, § 50b***—*when proof of age of deceased sufficient to sustain verdict.* Proof of the age of plaintiff’s intestate in an action for wrongful death, *held* sufficient to sustain a recovery, where the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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only reference thereto as shown by the record was a statement of plaintiff's counsel to the effect that he offered in evidence certain life tables showing the expectation of a life of a man thirty-four years old, and it appeared the defendant allowed the tables to be read to the jury unchallenged or without in any way questioning the truth of the statement of plaintiff's counsel.

5. DEATH, § 67*—*when damages not excessive*. A verdict awarding ten thousand dollars for wrongful death of a railroad switchman held not excessive under the evidence.

Appeal from the Superior Court of Cook County; the Hon. Hugo PAM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Affirmed. Opinion filed October 7, 1914. Rehearing denied October 19, 1914.

KRETZINGER & KRETZINGER and L. L. SMITH, for appellants.

E. W. AUSTIN and CHARLES C. SPENCER, for appellee.

MR. JUSTICE DUNCAN delivered the opinion of the court.

Appellee recovered a judgment of ten thousand dollars for the death of William H. Varnholtz. The evidence disclosed that Varnholtz was employed as head switchman by the appellant Railroad Company in its switch yards north of 55th street in Chicago. The other members of the crew were Patrick J. Forbes, conductor and foreman and one of the appellants; Duns-worth, rear switchman; Rathbun, engineer; and Lang, fireman. The switch yards contained sixteen tracks, including one main southbound and one main north-bound track. Varnholtz worked there altogether only four nights, the crew being a night crew. On the night of September 16, 1909, the crew began work about seven o'clock. Early that night they had taken twelve cars off of switch track No. 8 and placed them on switch track No. 9 by taking them south beyond switch track No. 8 and thence backing them north on track 9 east of track 8. Those cars were loaded and carded

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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for different roads, but were to remain on the hold tracks for further instructions. After their night meal Forbes, as foreman, gave orders to Varnholtz and Dunsworth to place the cars on track 9 back on track 8. Dunsworth and Varnholtz proceeded to execute that order and rode on the footboard of the engine headed north down the lead to those cars. Varnholtz stepped off and coupled the engine to those cars, and then remained there on the east side of track 9. In obedience to a signal by Dunsworth the engineer moved south on track 9 towards the south end of track 8, pulling thirteen cars, including the twelve that had previously come from track 8. Dunsworth, while walking south towards Forbes, noticed the extra car to the rear of the twelve, and said to Forbes: "You will have to kick that car in there again. It is not wanted over on 8." The thirteen cars were then quite a distance south of Varnholtz and near the place where they were to have been stopped and backed onto track 8 by Forbes' order. Forbes then, without notice or warning to Varnholtz, ordered Dunsworth to kick back on track 9 the extra car, called in the record a "Swift freezer," and at the same time himself gave a signal to the engineer to "back up," and uncoupled the Swift freezer from the twelve. The engineer at once backed or moved his engine to the north, and the Swift freezer was thus kicked back on track 9 at the rate of from four to six miles an hour against Varnholtz, and he was thus knocked down and killed on that track about 12:40 A. M.

All of the six counts of the declaration were taken from the consideration of the jury on motion of appellants, except the fourth count, which charged that Forbes was foreman of the crew with authority to distribute and place the cars in the yards, and that it was the duty of the crew, including the deceased, to obey Forbes' orders and to distribute and place the cars at the points designated by his orders; averred the giving of the order by Forbes to remove the cars

on track 9 to track 8 as aforesaid, and his change in that order without notice or warning to Varnholtz as, to the Swift freezer, and that by reason of his negligence in so ordering the Swift freezer kicked back on track 9 without notice, etc., that Varnholtz was struck and killed by said car while crossing over track 9, using due care, etc.

It is urged by appellants that the evidence in the record does not support the verdict and judgment, and that their motion to direct a verdict as to the fourth count should have been given. Four propositions are discussed in support of that contention: (1) That appellants were not guilty of the negligence charged; (2) that Varnholtz and Forbes were fellow-servants; (3) that Varnholtz assumed the risk; and (4) that he was guilty of contributory negligence.

First. Appellant Forbes testified that as foreman of the switching crew his duties were to instruct the men of his crew what to do and to see that all the cars went to their proper places. These were his duties as boss or as vice-principal of the railroad company. He also assisted when necessary or convenient in the execution of his orders by giving signals, throwing switches, coupling and uncoupling cars, etc., and in that work his acts were usually those of a fellow-servant. An examination of the evidence shows clearly that by his testimony, that it was his duty "to instruct the men of his crew what to do," he meant that it was his duty to tell them on what tracks and at what points the various cars in the yards were to be placed, and to indicate or direct the various movements and disposition of cars in accomplishing his orders for distributing and placing the cars that were carded and directed for shipment on the various roads. Each of the other members of the crew knew how to execute those orders by moving the engine, coupling and uncoupling cars, giving signals, throwing switches, etc., and needed no orders or directions in those mat-

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ters, and each member of the crew had his special part to do in the execution of the foreman's orders. Forbes was furnished a list of the cars by the yardmaster, which he consulted in giving his orders as to the placing of the cars, and no car or cars could be placed except by his orders, unless in case of his absence, and then the rear switchman performed his duties as boss. The head switchman's duties were to keep in sight of the engineer when necessary to take signals from the rear switchman or conductor and to repeat them to the engineer, to couple and uncouple cars at or near the engine and to line up switches for the engine. The rear switchman threw the switches down in the field and coupled and uncoupled the cars there and distributed or placed them in accordance with the conductor's orders. The head switchman usually rode the engine or the cars to the next place where he was to couple or uncouple cars, if that was necessary, or could remain at his next place of work if there and the engine was moving to points at which he could have no work until its return. In giving signals to the engineer he could remain any distance away from the engineer if the engineer could see the signals. Either switchman did the work of the other when necessary or convenient. The foregoing facts clearly appear in the record, and it needs no argument to show that in order for the switchmen to protect themselves against the movements of cars night or day, they should be informed in switch yards at all times what is being done; that is, where the cars were to be moved and placed. The last order Forbes gave to those switchmen before Varnholtz was killed was to place all the cars on track 9 back on track 8. They were proceeding to do it in the usual way. Varnholtz had evidently remained on the east side of track 9 where he last coupled the engine to the cars, because he had no work to do until the engine returned on track 8 just about opposite and a few feet west of

him. His next work, as testified by Dunsworth, was to uncouple those cars from the engine on track 8 just west of him when the engine returned there. No one testifies to the contrary, and Dunsworth testified that there was no occasion for his riding the engine down to and beyond switch 8 and back on 8, because he had nothing to do while that movement was being made. Forbes must have known that for he does not contradict Dunsworth in that testimony. He did testify that he last saw Varnholtz alive right where Varnholtz was left by Dunsworth on the east side of track 9. Varnholtz had to cross track 9, and no doubt was crossing it when killed, to reach track 8 opposite him to uncouple the engine from those cars on their return. Varnholtz was not, therefore, shown to be at a place other than his duties required him to be, but was where he might be expected to be in the discharge of his duty, and, therefore, Forbes was clearly shown to be negligent in failing to perform his duty as vice-principal or foreman in informing Varnholtz that the Swift freezer was to be replaced or kicked back on track 9. That negligence was the proximate cause of his death, because his death would not have happened but for that order, and he no doubt would have saved himself if he had known of that order. Forbes knew there was nothing in any signal that he or Dunsworth were giving or could give that would give Varnholtz notice a car was being kicked back on track 9, because the evidence clearly shows that the "back up" signal and the "kick back" signal are one and the same, and that at night it cannot be told by any signal whether cars are being shoved back or kicked back, or on to what track they are being shoved or kicked back. The evidence also shows it was so dark that night that a car could only be seen about a car length when one was looking for it. It is negligence for the conductor and foreman of a switching crew to order a car or cars to be shoved or kicked back onto a track where another employee

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is performing his duties when that employee has no reason to expect such a move and has all reason to believe that they are being moved onto another track by order of the foreman. *Adams v. Cleveland, C., C. & St. L. Ry. Co.*, 149 Ill. App. 574, affirmed in 243 Ill. 191.

Second. For the reasons aforesaid Forbes and Varnholtz were not fellow-servants at the time of the giving of the negligent order by Forbes as foreman. It was not the signal alone of Forbes that caused Varnholtz' death, but his order as vice-principal and the signal without notice to the deceased. Had Forbes not said a word, but by signal had caused the car to be kicked over track 9, it would have amounted to both an order as foreman and a signal as a fellow-servant, because no other member of that crew had any right or duty by which they could order that car placed when the conductor was on the ground. *Chicago, R. I. & P. Ry. Co. v. Strong*, 228 Ill. 281.

Third. It is clear also that the doctrine of assumed risk has little or no application to this case. Varnholtz did not know and had no means of knowing the danger at the time he was killed, except to look for the car in the dark at a place where he had no reason to expect it to be. While there is some evidence in the record that it was customary to kick back cars in that switch yard of appellant without notice to any one, yet it was not proved that Varnholtz knew of the custom. It was not proved that it was customary for the foreman to violate his duty in informing the crew where the cars were to be placed. Had Varnholtz had that knowledge, kicking the car back would have caused Varnholtz no more danger than shoving or pushing it back with the engine. All the notice he needed was that it was coming back on track 9, and he could have protected himself no matter how it came. The danger to Varnholtz was not one of the ordinary risks of that business. Negligence of the master, or of his

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representative, is not one of the ordinary risks of the employment assumed by the employee or servant, until he has knowledge or notice thereof. For the reasons aforesaid and for others so very apparent as to not require argument or statement, the court very properly refused the following instruction:

“That when the deceased entered the employ of the defendant, he assumed all the natural and ordinary risks incident to such service; that he was bound to know that switch engines and cars were running backward and forward over the tracks and switches where he was working, and if you believe from the evidence that the deceased was such switchman and in the service of the defendant, and assumed the risk as above defined, then the plaintiff in this suit is not entitled to recover, and your verdict should find the defendant not guilty.”

Fourth. The evidence in the record for the reasons above given is entirely consistent with the contention that the deceased was in the discharge of his duties and in the exercise of reasonable care for his safety when he was killed. There was no eyewitness of his injury or of what he was doing at and just before he was killed. Witnesses testified that he was a competent, sober and a very careful switchman, and that that was his reputation. There is no evidence to the contrary. Ordinary care on the part of the deceased was established by his administrator by the highest proof of which the case is capable, and it was sufficient to support the verdict of the jury on that question. *Collison v. Illinois Cent. R. Co.*, 239 Ill. 532.

The negligent order given by Forbes was an affirmative wrong done by him in violation of a common duty owed by the appellant Railroad Company and Forbes to Varnholtz, and constituted them joint tort feorsors, and they were, therefore, jointly liable. *Republic Iron & Steel Co. v. Lee*, 227 Ill. 246.

Appellants also insist that the verdict and judgment are excessive, because the record evidence does

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not furnish any proof of the age of the deceased. Under ordinary circumstances we would regard such an oversight as sufficient grounds to reverse any judgment of ten thousand dollars for a death where the earning capacity of the deceased was no more than the proofs in this case disclose. No one testified to the age of Varnholtz, so far as the record shows, but it does show that Mr. Spencer, appellee's attorney, offered in evidence Wigglesworth's tables, using this language:

"I offer in evidence Wigglesworth's tables showing the expectation of life of a man 34 years old. I am offering the part relating only to the age included in the case. It shows that a man of the age of 30 has an expectation of life of 30.24 years. And that a man of 35 years has an expectation of life 28.22, and that the computation is not carried out for the ages between 30 and 35."

The offered evidence was objected to by appellants specifically and solely on the ground that the tables offered were the tables printed in Puterbaugh's Pleading and Practice and were not in any way authenticated to be correct. The objection was overruled by the court and the tables showing precisely what Mr. Spencer said they disclosed were read to the jury. By their own action appellants allowed proof to go to the jury unchallenged in any way that the offered tables showed that Varnholtz had an expectancy of life of more than twenty-eight years when killed, and in no way questioned the truth of Mr. Spencer's statement, in substance, that the deceased was thirty-four years of age at his death. Not a single other reference to the question of Varnholtz's age appears anywhere in the record by the instructions, motion for new trial or otherwise. If this question had at any time been raised by argument to the jury or otherwise before verdict, the learned Court who tried the case would undoubtedly, as he had a right to do, have allowed the evidence, which was by oversight omitted, supplied by

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appellee. We do not question that it is the law that where the motion for a new trial is general, as in this case, and does not set out the specific grounds therefor, that an appellant, where not otherwise estopped, may raise any question for review in this court, where no requirement was made that the grounds for the motion be specified, as held in *Ottawa, O. & F. River Val. R. Co. v. McMath*, 91 Ill. 104, and in *Yarber v. Chicago & A. Ry. Co.*, 235 Ill. 589.

Appellants make no question here as to the correctness of the court's ruling in admitting in evidence the life tables in question, and such tables are competent evidence. *Winn v. Cleveland, C., C. & St. L. Ry. Co.*, 239 Ill. 132.

Moreover, it does positively appear from the evidence, that at the time of his death Varnholtz had been married about five years, and left a widow and two young children; that he was a sober man, a competent switchman, had been a switchman for five years, had good hearing, good eyesight and good health; and that he worked steadily earning one hundred dollars to one hundred and twenty-five dollars per month, and gave his earnings to the support of his family. The evidence tended to prove that he was a young, vigorous and industrious man, and that the verdict is not excessive. Had the proof been actually made that the deceased was thirty-four years of age, the only ground for appellant's claim that the verdict is excessive would be removed. The judgment is well supported by the record, and appellants should be estopped to insist that the deceased was not proved to be thirty-four years of age by their failure to make that objection at the time the life tables were offered, or at any time thereafter before verdict.

The judgment is, therefore, affirmed.

Affirmed.

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Hugo Peterson, Executor, Appellee, v. The Sahlin Company, Appellant.

Gen. No. 18,987.

1. MASTER AND SERVANT, § 845*—*when master liable for act of night watchman in leaving elevator door open.* Where a night watchman is employed to guard and keep an elevator door closed until the elevator man arrives in the morning, and the watchman in operating the elevator left the door open so that an employee returning to work in the morning fell into the elevator shaft, *held* that the leaving of the elevator door open was the act of the employer, though it was not within the scope of his employment to run the elevator.

2. MASTER AND SERVANT, § 98*—*defenses not available in action for violation of Factory Act.* The doctrine of assumed risk, contributory negligence or fellow-servants cannot be availed of as a defense in an action by an employee to recover for injuries resulting from a violation of the Factory Act, J. & A. ¶¶ 5386 *et seq.*

3. MASTER AND SERVANT, § 784*—*when instruction erroneous as omitting elements of recovery.* In an action by an employee based on an alleged violation of the Factory Act, *held* that an instruction which directed a verdict and set out the provisions of the act alleged to be violated was erroneous for the reason that it did not embody all the elements necessary for the jury to find before returning a verdict, and that it failed to define for the jury the terms "factory, mill or workshop."

4. MASTER AND SERVANT, § 98*—*proof essential to a recovery for a violation of Factory Act.* To entitle an employee to recover under statutory counts for violation of the provisions of the Factory Act, J. & A. ¶¶ 5386 *et seq.*, such employee must prove that he or she was an employee in a factory, mill or workshop within the meaning of the act, and that the defendant operated or controlled it.

5. MASTER AND SERVANT, § 792*—*when instruction as to applicability of statute improper.* In an action for an alleged violation of certain sections of the Factory Act, where an instruction given for plaintiff set out such sections of the act, the language of a portion of the instruction which intimated that whether or not the sections were applicable was a question for the jury, *held* improper and misleading.

6. MASTER AND SERVANT, § 98*—*what constitutes violation of Factory Act.* Under the Factory Act, J. & A. ¶¶ 5386 *et seq.*, an

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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employee is not required to prove a wilful violation in order to recover, as is required under the Miners' Act, J. & A. ¶¶ 7475 *et seq.*

7. MASTER AND SERVANT, § 622*—*when evidence of previous violations of Factory Act inadmissible.* In an action by an employee to recover for personal injuries resulting from a violation of the Factory Act, evidence that the employer had violated the statute on other occasions than the one relied on for recovery, *held* inadmissible.

8. MASTER AND SERVANT, § 98*—*what not a compliance with provision of Factory Act requiring lights in front of elevators.* Section 17 of the Factory Act, J. & A. ¶ 5402, requiring an artificial light when necessary to be placed in front of elevators, etc., *held* not fully complied with by placing such light in the elevator.

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Reversed and remanded. Opinion filed October 7, 1914. Rehearing denied October 16, 1914.

JOHN A. BLOOMINGSTON, for appellant.

DANIEL V. GALLERY, for appellee.

MR. JUSTICE DUNCAN delivered the opinion of the court.

The Sahlin Company appealed from a judgment of \$2,000 against it and in favor of Edna Ellingsen in her suit for personal injuries.

Appellee had been employed by appellant for five years and when injured was working for it upon the fourth floor of its building at 1403 and 1409 on the south side of West Congress street, Chicago. The building fronts north one hundred feet and extends south to the alley, and a three story building adjoins it on the corner lot immediately east. Entrance to the building from Congress street is made through a hall in the northeast corner extending south thirty-four feet. The elevator shaft projects into the hall from the east wall, is sixteen feet south of the double door entrance, and faces west. The hall north of the ele-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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vator is thirteen feet and four inches wide and five feet nine inches where it passes west of the elevator. The west wall of the elevator is twenty inches thick, and the doors to it are hung about even with the east side of that brick wall, and those doors have glasses about three feet long and twenty-two inches wide, the door that is moved by the elevator man being about three feet wide. The inside walls of the elevator are said to be whitewashed, but of a "dark white color," according to appellee's evidence, by reason of having been soiled. The ceiling was about fourteen feet in height. There is a large room just west, separated from the hall by a partition, lathed and plastered for the first four feet up from the floor, and the rest of the partition is of opaque wire glass. The natural light that reached the elevator came from the north through the clear glass in the double doors and in the transom above them, the glass in each door being two feet four inches by five feet six and one-half inches, and that in the transom being six feet six inches by eighteen inches. Appellant claims that some light comes through the glass partition from the well-lighted room west of it. There was no artificial light in front of the elevator. There was one in the elevator for use on dark days, but it was out of commission on the day in question. Appellee was injured on a bright sunny day, July 13, 1910, about two minutes before 7:30 A. M., the time to begin work there, by falling into the well hole at the bottom of the elevator shaft and fracturing the fibula or small bone of her right leg, by reason of which she lost several months' time and incurred \$215 expenses for hospital fees and services of a physician in being healed. Appellee sometimes used the elevator there and sometimes the stairway to go to her working place. On the day of her injury she came into the building in a hurry having only two minutes to get to her work on time. A crowd of girls had preceded her to the front of the elevator,

and as the regular elevator man was late that morning, at the urgent entreaty of those girls, the watchman had come down from the third floor with the elevator, and had taken a load of them to the fourth floor, and by oversight had left the elevator door on the first floor open just before appellee came. Appellee walked straight south down the hall to the elevator, turned to her left to enter it, and seeing the door was open, and thinking the elevator was in place, stepped into the shaft and fell to the bottom of the well hole.

A common-law declaration was originally filed charging negligence in appellant for its failure to furnish her a reasonably safe place in which to work, and reasonably safe means of reaching her work, charging failure to keep the elevator door closed and properly lighted. Appellee treats this count as a part of her declaration, although she asked no instructions applicable to it and it has little or no importance in this appeal.

Afterwards, what is called an amended declaration was filed containing three statutory counts, all charging that appellant controlled there a factory building or workshop and the said elevator, at which factory or workshop appellee was employed by it in its business conducted there, and on which elevator it had frequently carried her prior to her injury, while so at work. The first count thereof charges a violation of section 92, ch. 48, of Hurd's St. 1911, p. 1129 (J. & A. ¶ 5389), or section 4 of what is commonly known as the Factory Act, by allowing the said elevator door to remain open at a time when it was not necessary that it be open in order that the elevator might be used.

The second count charges a violation of section 17 of the Factory Act (J. & A. ¶ 5402) by neglecting to keep burning a proper light in front of said elevator door when it was dark there and on a work day, and when the influx of natural light there did not make artificial light unnecessary.

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The third count of the amended declaration combined the first two statutory charges aforesaid and all three of said counts averred that appellee was injured by reason of appellant's violation of said statute, and while she was in the exercise of due care for her own safety.

It is contended by appellant that the evidence is not sufficient to sustain the averment in the second count of the amended declaration, that it was dark at the elevator and that the influx of natural light there did not make artificial light unnecessary. Much of this argument is based upon appearances at and in the elevator as shown by a certain photograph in the record, and the evidence of nine of appellant's witnesses who testified that the elevator and its surroundings were as well lighted and as plain to the view of any one standing in front of the elevator as they appear in the photograph. It must be admitted that all things in and about the elevator are very plain and easily seen from any point in the hall in front of the elevator if the witnesses were not mistaken about the correctness of the photograph, because the picture shows that every particle of the inside and outside of the elevator is so well lighted that they could easily be seen. It is claimed by appellee that the photograph was made from a negative taken by a flash light, but if this be true it should have been shown by evidence that was certainly obtainable, but which does not appear in the record. As the judgment will have to be reversed for reasons to be herein set forth, we do not desire to go into a full discussion of the merits of the case on the evidence. We think, however, that the question argued is one that should be submitted to the jury for settlement. Appellee testified on that point that there was no light in front of the elevator on the day of her injury, which was a work day there, and that there was no light in the elevator shaft, and that it was dark in front of the elevator and in the elevator shaft. One

of the said nine witnesses for appellant, Freda Amies, on cross-examination, testified: "You had to walk up to the elevator before you found out the elevator wasn't there. You couldn't see it until you got there, not until you got in front of it. You have to go up to the door to see, if it isn't there. You are in the hall when you are standing in front of the door and until you are standing in front of the wall you can't see whether the elevator is open or not. You have got to get right up to it. You can't see it until you get up to it."

The elevator was above the first floor when appellee was injured. The picture in question shows the elevator in place on the first floor, and, therefore, does not present a photograph of the appearance of things there with the elevator removed to its situation when the injury occurred.

Appellant also strenuously insists that the watchman who ran the elevator at the request of the other girls there, and negligently left open the said door of the elevator shaft, had no authority whatever from appellant to run the elevator, and that his acts in that regard did not render appellant liable for any injury by reason of his operating the elevator. That may be conceded, but that argument is completely met by the fact that the operation of the elevator was not the sole cause of appellee's injury. The opening and leaving open the said door was an approximate cause of her injury which could not have happened as it did if the door had been kept properly closed. If the watchman was the representative of appellant to guard and keep said door closed in the absence of the elevator man, appellant would be chargeable with his knowledge in that regard, and bound by his negligence in opening and in failing to close the door after he had opened it, even though those negligent acts were committed preliminary to his unauthorized act of running the elevator. The facts that he was employed there

as night watchman and that he was the custodian of the key to the door in question while such watchman, and that his duties required him to be at the premises until the elevator man came on for work in the morning, tend to prove that it was a part of his duty to keep the said door closed at the very time of appellee's injury. The evidence might have been made more satisfactory upon that point by further examination of the watchman, but being a hostile witness to appellee she was under no obligation to cross-examine further upon that point. We may say in conclusion on this point that the question of whether or not appellant is to be held to notice of the fact that the elevator door was open at the time in question depends solely on whether or not it was chargeable with the negligence of the watchman in leaving the door open, for if it was a part of his duty to keep the door closed appellant was chargeable with his knowledge and his acts, and the question of how long the door had remained open has no bearing on the question of notice in this case. If the act of the watchman in that regard was the mere act of a servant done outside of the scope of his employment, appellant was not bound thereby, any more than it would have been if the door had been opened and left open by a stranger or intruder.

Appellant offered certain instructions that were refused by the trial court in which the defenses of assumed risk, contributory negligence and of fellow-servants were presented for the consideration of the jury and refused by the court. Certain other instructions were given by the court for appellant in which the jury were told that contributory negligence of appellee would be a bar to her recovery. We do not care to discuss those refused instructions further than to say they were properly rejected as to the common-law count, because they were not expressly limited to that count, and that as to the statutory counts none of those defenses were

applicable. Our Supreme Court in the case of *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244, as we understand that decision, held, in substance, that the doctrine of assumed risk, contributory negligence and of fellow-servants furnish no defense to a violation of the Factory Act by the operation of a factory or workshop within the meaning of that act. The reasoning and the declarations of that court, on pages 256 to 260 inclusive in that case, make it clear that those defenses cannot be made to a suit for personal injuries by an employee in a factory or workshop against the operator thereof, where the charge is that the injury was caused by a violation of that act by the operator. The Court expressly decides in that case that the doctrine of assumed risk furnishes no defense to such a suit by an employee. On page 258 of that opinion the Court, speaking through Justice Dunn, said: "For many years we have held, in the construction of the mining act, that neither assumed risk nor contributory negligence is available as a defense to a suit for damages caused by a wilful violation of the provisions of that act," citing a number of cases. It is then further said by the Court that the reasoning on which those cases under the mining act are based is applicable to a case under the Factory Act, and that in view of the construction given to the mining act in regard to the assumption of risk, the General Assembly must have supposed that the same construction given to the mining act providing for the health and safety of miners would be given to the Factory Act in that regard, as that statute was expressly passed to provide for the health and safety of employees in factories.

All the decisions of our Supreme Court on the Mines and Miners' Act, beginning with the case of *Bartlett Coal & Mining Co. v. Roach*, 68 Ill. 174, have held, wherever the questions have been raised, that the doctrine of assumed risk and of contributory negligence furnish no defense to a wilful violation of that

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act by the operation of a mine, no matter how negligent the injured employee may have been. It has been frequently declared in those decisions that the statute was not only designed to protect employees in coal mines from the inherent dangers of the business, but also to protect them from the result of their own negligent or inconsiderate action. *Brunnworth v. Kerens-Donnewald Coal Co.*, 260 Ill. 202; *Catlett v. Young*, 143 Ill. 74. And an averment in the declaration that the plaintiff was in the exercise of due care under that act is surplusage and need not be proved. *Carterville Coal Co. v. Abbott*, 181 Ill. 495.

It is also well settled by the decisions under the mining act that the operators of coal mines are responsible for all injuries sustained by employees in their coal mines by reason of a wilful violation of the statute by any of their agents or employees while working within the scope of their employment, and that the doctrine of fellow-servants furnishes no defense to such an injury. The important question is as to the authority or duty of the offending employee, and not as to whether or not he was a fellow-servant of the injured employee. The concurrent negligence of the injured servant or of any third person is no defense to such an action. *Girard Coal Co. v. Wiggins*, 52 Ill. App. 69; *Joseph Taylor Coal Co. v. Dawes*, 122 Ill. App. 389, affirmed in 220 Ill. 145; *Moore v. Centralia Coal Co.*, 140 Ill. App. 291; *Niantic Coal & Mining Co. v. Leonard*, 126 Ill. 216; *Spring Val. Coal Co. v. Rowatt*, 196 Ill. 156; *Brunnworth v. Kerens-Donnewald Coal Co.*, *supra*.

Appellant complains of the following instruction of the court given for appellee:

“The court instructs the jury that section 4 of an act to provide for the health, safety and comfort of employes in factories, mercantile establishments, mills and workshops in this State, and to provide for the enforcement thereof, so far as said section may be applicable to this case, is as follows:

“But the court does not mean to intimate that any part of the statute is applicable to any particular state of facts, as the facts are to be determined by the jury from the evidence guided by the instructions of the court as to the law:

“‘All hoistways, hatchways, elevator wells, and wheelholes, in factories, mercantile establishments, mills or workshops, shall be securely fenced, enclosed, or otherwise safely protected and due diligence shall be used to keep such means of protection closed, except when it is necessary to have the same open in order that said hatchways, elevators, or hoisting apparatus may be used.’

“The court further instructs the jury that section 17 of said act is as follows:

“‘In all factories, mercantile establishments, mills or workshops, a proper light shall be kept burning by the owner, or lessee, in all main passageways, main hallways, and all main stairs, main stair landings and shafts, and in front of all passenger or freight elevators, upon the entrance floors and upon the other floors on every work day of the year, from the time that the building is open for use until the time when it is closed, except at times when the influx of natural light shall make artificial light unnecessary, provided that when two or more tenants occupy different floors in one building, such elevator shaft need be lighted only on the floors used and occupied by employees.’

“The court further instructs the jury that if you find from the evidence in this case, under the instructions, that there was no light in front of the elevator in question, and that the influx of natural light did not make artificial light unnecessary, and you further find that the defendant did not use due diligence to keep the elevator door closed, and you further find from the evidence that plaintiff was using due care and diligence for her own safety, at and before the time she was injured, and that she fell into such elevator shaft by reason of the failure of defendant to obey the law as above recited, if defendant did fail to obey said law, then you will find the defendant guilty.”

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The foregoing instruction directs a verdict and should embody all the elements necessary for the jury to find before returning a verdict for appellee. It was necessary for appellee to prove and for the jury to find from the evidence that the building or place in question was a factory or workshop within the meaning of said statute, as alleged in her declaration, and that she was employed at such workshop or factory by appellant, and under said section 17 that she was injured on a work day there at a time when the building was open for use. By section 29 of the Factory Act (J. & A. ¶ 5414), the terms "factory" and "mill or workshop" are specifically defined, and it is very clear that there is no sufficient proof in the record that the place was a factory, mill or workshop within the meaning of the statute, and there was no attempt to prove it. In speaking of the place some of the witnesses merely refer to it as, "the plant," "the building," "the factory building," and once or twice appellant is apparently referred to as "the corset company." Not one question was asked by either party as to the character of the work that was done there or who carried it on and for what purpose, or as to the character of the machinery, if any, used there and how driven, or as to the articles made there, if any, or as to the number and character of the people who worked there and what they did and for whom they were employed, etc. The terms "factory, mill or workshop" were not defined for the jury. In order to recover under the statutory counts appellee was required to show that at the time of her injury she belonged to the class of persons for whose protection and benefit the statute was enacted, that is, that she was an employee in a factory, mill or workshop within the meaning of the statute, as alleged in the declaration, and that appellant operated or controlled it. It was not sufficient to prove merely that she was at work at appellant's building where an elevator was in use for employees. *Brunnworth v. Kerens-Donnewald Coal Co., supra.*

With the proper evidence suggested above in the record the sections of the statute quoted would be entirely applicable, and whether or not applicable should not be left to the jury as was apparently intimated by the Court in the first part of the instruction. Those remarks of the Court were improper and likely to mislead a jury.

The instruction on the measure of damages given for appellee is not subject to the objections urged by appellant. An instruction in almost the identical same words throughout was approved by the Supreme Court in *Cicero & P. St. Ry. Co. v. Brown*, 193 Ill. 274.

The objections to appellant's refused instructions have already been indicated in this opinion and need not be here referred to as they were clearly erroneous and misleading. The facts, in other words, that the watchman was not authorized to run the elevator, or that the elevator door was left open for a very short time, could not have any tendency to excuse appellant. The leaving of the door open by the watchman was a proximate cause of appellee's injury, and if it was the watchman's duty to guard and keep the door closed, it was the act of appellant, if it so employed him.

Under the Factory Act appellee was not required to prove a wilful violation of that act in order to recover, as is required under the Mines and Miners' Act. A negligent violation of the Factory Act was all that was charged and all that she was required to prove, and in this respect the two statutes aforesaid differ. Where wilfulness, or guilty knowledge or malice is charged and proof thereof required, collateral facts or proof of other similar offenses than those charged in the pleadings may be proved to show the knowledge or intent of the defendant. *Joseph Taylor Coal Co. v. Dawes*, 220 Ill. 145.

The same rule, however, does not apply where the charge is negligence simply. It was, therefore, error in the court to admit the evidence of appellee that ap-

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pellant had violated the statute in question on other occasions than the one relied on for recovery, that is, that on other occasions it was dark and an artificial light was required and not furnished. *Chicago, B. & Q. R. Co. v. Lee*, 60 Ill. 501.

The remark of counsel for appellee to the court complained of by appellant was improper and the court so held, but as the case will be remanded for further trial, it will not be necessary to further consider this objection, or the objection that the verdict is excessive.

We would not be disposed to reverse the judgment upon those grounds, if the record was otherwise free from error, and not lacking in evidence as already indicated.

The artificial light in the elevator was not a full compliance with the statute, even had it been burning, as the statute also requires a light when necessary to be placed in front of the elevator. A light in the elevator when hoisted to an upper floor would give little or no light at the foot of the elevator.

The death of appellee has been suggested on the record since this cause was taken, but the record does not disclose whether she died from the effects of the injury or from other causes.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Staver Carriage Company, Appellee, v. American & British Manufacturing Company, Appellant.

Gen. No. 18,810.

1. ACCORD AND SATISFACTION, § 1*—*when agreement does not constitute.* A subsequent agreement by the seller of goods which amounted to a mere promise to adjust the differences that had arisen over a breach of a warranty in a prior contract of sale, *held not*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to amount to a settlement and satisfaction of all claims for damages resulting from a breach of the contract of warranty, where the agreement was not performed.

2. SALES, § 387*—*what not waiver of right to sue for breach of warranty.* Failure of the buyer to pay for goods that, after delivery, have been found to be defective and not suitable for the purpose for which they were purchased, or that in other respects are not as warranted, *held* not a waiver of the right to sue for breach of the warranty.

3. SALES, § 404*—*measure of damages for breach of warranty where article is sold for specific purpose.* Where an article is sold for a specific purpose, and the seller knows it, and warrants it to be of a particular quality and suitable for the purposes for which it is sold, and it is not as warranted and articles of the kind and quality contracted for cannot be purchased in the open market, the value of the article for such specific purpose is the basis of estimating damages, and if the special purpose for which it is to be used is a resale, or the production of some other article to be sold, then prospective profits are proper elements of damage, provided it is established by the evidence to a reasonable certainty that the article would have been sold as contemplated and how much profit would have been realized.

4. DAMAGES, § 61*—*when evidence of loss of profits admissible.* Where motors were purchased for the purpose of being installed in automobiles and sold and were warranted to be free from defects of material and workmanship and to be fit for the purpose for which they were purchased, *held* in an action for a breach of the warranty that it was not error to admit evidence of the loss of prospective profits.

5. SALES, § 402*—*when instruction authorizing recovery for loss of prospective profits not warranted by the evidence.* In an action for a breach of a warranty in a sale of motors, submitting to the jury by instructions the question of loss of prospective profits, *held* improper where there was no evidence from which the jury could determine the amount of profits, and no evidence on the question whether other motors of the same kind and quality were obtainable in the market at the time of the breach.

6. SALES, § 400*—*admissibility of defective parts of article sold.* In an action for a breach of a warranty in the sale of motors, the admission in evidence of the several parts of the motors *held* largely a matter of discretion with the trial court, and unless such discretion is abused its admission will not constitute reversible error.

7. SALES, § 400*—*preliminary proof necessary to introduction of defective parts of article sold.* In order to render admissible in evidence the several parts of a motor in an action for breach of a warranty, the preliminary proof should show that the parts are

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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substantially in the same condition that they were when such condition was material to the issue, or if they have been broken, worn, altered or marred since such time, the court should require evidence to show in what particular they have been changed, the use to which they were put, and, if material, the test or circumstances under which they were broken or marred, and this whether they are introduced to prove a fact or for the purpose of illustration.

8. EVIDENCE, § 223*—*when letters inadmissible as hearsay evidence.* In an action for breach of a warranty as to motors furnished plaintiff to be installed in automobiles, letters written by persons who were purchasers of the automobiles condemning the motor, *held* improperly admitted for the reason they were hearsay evidence.

9. SALES, § 402*—*when instruction in suit for breach of warranty improper.* In an action for breach of a warranty that motors furnished should be free from defects of material and workmanship, and that the motors should be fit for the purpose for which they were furnished, an instruction given for plaintiff which told the jury that the seller was required by its contract to furnish motors that would render automobiles in which they were installed reasonably saleable, if not otherwise defective is erroneous.

10. SALES, § 402*—*when instruction erroneous as assuming facts.* In an action for breach of a warranty in a contract for the sale of motors, an instruction *held* bad for the reason it assumed there was a market value for motors in the condition they were when received by the plaintiff.

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Reversed and remanded. Opinion filed October 7, 1914. Rehearing denied October 14, 1914.

MONTGOMERY, HART & SMITH, for appellant; LOUIS E. HART and JASPERSEN SMITH, of counsel.

BULKLEY, GRAY & MORE, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Appellant, American & British Manufacturing Company, of Bridgeport, Connecticut, manufacture, among other things, gasoline motors. Appellee, the Staver Carriage Company, manufacture automobiles at Chicago, Illinois. On July 7, 1909, these parties entered

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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into a written contract, whereby appellant was to manufacture and deliver to appellee at stipulated times 500 four-cylinder gasoline automobile motors of a specified size and kind for the sum of \$203 each. This contract contained the following stipulations:

“WHEREAS, the Manufacturer desires to manufacture for and sell to the Purchaser five hundred (500) automobile gasoline motors, and Purchaser, being a manufacturer of automobiles, desires to purchase said motors for use in the manufacture of motor cars. * * *

“Third, that each and every one of said motors will be thoroughly inspected and tested by manufacturer before shipment, and will be furnished complete, as per specifications, and ready to assemble in chassis. * * *

“Seventh, The Manufacturer guarantees and warrants to Purchaser that all motors manufactured and sold as aforesaid, shall be free from all defects of material and workmanship, that the workmanship and material thereof shall be thoroughly high class, and that said motors shall be fit for the purpose for which they are furnished.

“Eighth, That during fifteen months from the date of shipment of motors the manufacturer shall and will, upon notice, promptly replace, without cost to the Purchaser, or give credit for, at Purchaser’s option, any defective motors or parts that shall be defective either in workmanship or material.”

Appellant began the manufacture of these motors and on February 26, 1910, had delivered 331 of them to appellee. Of these, 36 were shipped on that day. On that day there were outstanding the promissory notes of appellee, of the face value of somewhat over \$40,000, which had been given to appellant in settlement for motors delivered. The 36 motors shipped February 26, 1910, were not settled for promptly and appellant on March 22, 1910, wrote to appellee requesting a cash payment therefor. Appellee had previously complained to the representatives of appellant that the motors were defective and on March 28, 1910, wrote to appellant at Bridgeport, Conn., in substance, that

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its representative, Mr. Hill, had admitted that the complaints made by appellee about the motors were justified and had promised that Mr. Gulick, the vice-president and general manager of appellant, would come to Chicago, but that he had not done so, and notifying appellant that it would refuse to pay the notes given for the motors as the same matured and that it had picked out about 100 motors which it proposed to return to appellant, and asking for shipping directions. This letter concludes as follows:

“To us, it looks as though Mr. Gulick did not care to come and see us, after knowing the truth as to the situation here. The engines which we will ship back to you, you may not return to us after you have repaired them as we cannot use them in our cars, as our customers will not take that kind of goods, and we have made a contract for other engines, which we shall put in our cars to replace those of yours which we cannot use; and if any more engines are shipped us, we shall refuse to accept them.

Yours very truly,

H. B. S.”

Very shortly after this letter was received by appellant Mr. Gulick and a Mr. Hilfrey, the chief inspector of appellant, and a mechanic or two in its employ came to Chicago to investigate the complaints made by appellee concerning the motors. On April 1, 1910, the following writing was executed by the parties:

“Memorandum of Agreement made and entered into this first day of April, 1910, between the American & British Mfg. Co., party of the first part, and Staver Carriage Co., party of the second part.

“Witnesseth: Whereas the parties hereto made and entered into a contract bearing date the seventh day of July, 1909, by which it was agreed that party of the first part should sell and deliver to party of the second part five hundred (500) automobile gasoline motors as specified therein, deliveries and payments to be made as specified therein.

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“And whereas it has also heretofore been agreed, subsequent to the making of aforesaid contract, that the purchaser, Staver Carriage Co., was only obligated to take four hundred (400) of the said five hundred (500) automobile gasoline motors.

“And whereas party of the first part has heretofore shipped and party of the second part has received three hundred thirty-one (331) of said motors, and that there now remains under said contract as amended, to be shipped by party of the first part and received by party of the second part sixty-nine (69) automobile gasoline motors.

“And whereas of the three hundred thirty-one (331) motors heretofore delivered many have proven defective, and party of the first part is now hereby ready and willing to repair such defects and put all said motors in first-class condition, and compensate party of the second part for expenses occasioned by such defects.

“Now, therefore, in consideration of one dollar in hand paid, the party of the first part releases party of the second part from the obligation to take and receive said sixty-nine (69) gasoline engines.

“It is hereby however mutually agreed between the parties hereto that party of the first part does hereby sell and agree to deliver any number of automobile gasoline motors, 4x4, 4 cylinder, prior to May 15, 1910, not exceeding sixty-nine (69) in number, which party of the second part may order from party of the first part, deliveries to be mutually satisfactory, and to be sold and delivered upon the same specifications, terms, conditions and warranties as contained in contract of July 7, 1909, no motors to be shipped without shipping instructions therefor in writing, and to be shipped as promptly thereafter as may be mutually agreed upon.

“It is further hereby agreed that party of the first part will furnish immediately the necessary material and men to adjust and put in first-class condition any and all engines heretofore delivered under contract dated July 7, 1909, subject to the acceptance of party of the second part upon its inspection, and party of

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the first part hereby further agrees to pay, or allow credit, to party of the second part on rendering statement any and all expenses, such as, freight on cars which have been returned by agents on account of motor trouble, expenses incurred in plant of party of the second part, and any and all traveling expenses or other expenses which have been paid or incurred by party of the second part to make good with its respective customers on account of motor engine troubles, and where cars have been returned for motor and other car defects, the expense chargeable against party of the first part is to be prorated.

“It is further hereby mutually agreed that the party of the first part will supply sufficient helical cut gears to replace such fibre faced gears, at no charge, as may be found noisy or defective.

“It is further hereby agreed that should any of the motors now or hereafter repaired become defective that party of the first part will make the same good, or pay to party of the second part the expense of so doing, and pay in addition any expenses occasioned to party of the second part on account of defective motors. This clause of this agreement to continue for three (3) months from date of shipment of car by party of the second part.

“It is further hereby mutually agreed that party of the second part will pay any and all notes heretofore given as they mature; that any further indebtedness on account of motors which have been delivered will be paid either in cash, less discount, on June 1, 1910, or by party of the second part giving sixty (60) day note, with interest, therefor, as it may elect.

“In witness whereof the parties hereto, by their duly authorized officers, have executed this agreement in duplicate.

AMERICAN & BRITISH MFG. Co.

By CHAS. L. GULICK (Signed)
Vice-President.

STAVES CARRIAGE Co.

By H. B. STAVES (Signed)
General Manager.

Witness L. P. HALLADAY (Signed)
C. D. HILFERTY (Signed).”

After the foregoing writing was executed by the parties appellant sent several more skilled mechanics in charge of a foreman to the factory of appellee in Chicago, and put them at work there testing the motors and correcting the defects found therein. The most of these men were so engaged all summer, and at least one of them remained there until December 1, 1910. Appellee paid the notes mentioned, but did not pay any part of the bill for the 36 motors shipped February 26, 1910. During the summer of 1910, appellee still being dissatisfied with the motors made various complaints concerning them to appellant and on August 4, 1910, rendered an account to it for work and expense of repairing them and for damages on account of its claimed default in failing to furnish the motors according to the terms of the contract. No satisfactory adjustment of the differences between the parties being accomplished, appellee brought suit in the Circuit Court, and on January 6, 1911, filed its declaration consisting of three special counts and the common counts. The first and second counts were later amended. To the declaration as amended appellant filed the general issue and other pleas. By a plea of set-off appellant alleged that appellee made false statements to it as to the condition of the motors, which appellant relied on and expended large sums of money on the motors, and that appellee had refused to pay for the motors delivered prior to June 1, 1910, and that by reason thereof appellee was indebted to appellant in a sum in excess of that sued for by appellee. Issue was joined on the pleas. A trial resulted in a verdict for appellee for \$5,000. After a motion by appellant for a new trial was overruled, judgment was entered on the verdict.

Appellant urges several reasons why the judgment should be reversed. The first ground assigned is, "that appellee, plaintiff below, had no right of action upon the contracts upon which it specially declared, and

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which contracts were permitted to be introduced in evidence over the objection of appellant." Under this head it is argued that the court erred in overruling the demurrer to the first and second count of the amended declaration and in admitting in evidence the contracts of July 7, 1909, and of April 1, 1910. After the demurrer was overruled appellant elected to and did plead to the counts demurred to. The action of the court in overruling the demurrer cannot, therefore, now be reviewed. Under the issues as framed, these two writings were not only competent but necessary evidence, not only to establish the right of action of appellee, but also to sustain appellant's claim of set-off. The argument on this point has been broadened into a discussion of the question whether under the facts as disclosed in this record appellee has a cause of action on the contracts, or either of them, for the reason, as claimed by appellant, that appellee failed to perform its part of the agreement of April 1, 1910, wherein it agreed to pay by June 1, 1910, for the 36 motors shipped February 26, 1910. In support of that contention appellant cites *Harber Brothers Co. v. Moffat Cycle Co.*, 151 Ill. 84, as holding that where a vendee who has accepted goods delivered under an express contract fails to pay therefor according to the terms of the contract, such vendee cannot maintain an action against the vendor for damages resulting from his failure to perform his contract. The opinion of the court in that case does not support the contention of appellant. What is there said is:

"The question here distinctly presented as the controlling one, is whether a vendee who has accepted goods delivered under an express contract, but *not at the time or in the quantity* required by it, with knowledge of the default of the vendor in those respects, but has himself failed, *without legal excuse*, to pay for them according to it, can maintain an action on the contract for such a default of the vendor. We think the general rule, everywhere recognized, is

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against it, and has been specifically so applied in analogous cases in Illinois.”

It will be observed that the default of the vendor in that case was a failure to deliver the goods “*at the time*” and “*in the quantity*” specified in the contract. There was in that case nothing predicated on a failure of the seller to furnish goods of the *quality* or *kind* contracted for.

It cannot be doubted that the unconditional acceptance of goods that have been delivered at a later date or in a less quantity than stipulated for is a waiver of such breach of the contract, but we think no Illinois authority can be found holding that the failure to pay for goods that, after delivery to the purchaser, have been found to be defective and not suitable for the purpose for which they were purchased, or that are in other respects not as they were warranted to be, is a waiver of the right to sue for damages resulting from a breach of the warranty. On the contrary, we believe it to be the settled rule in this State that where the subject-matter of the contract is something that is to be manufactured for a special purpose and the manufacturer undertakes that when it is completed and delivered it shall be of a certain quality and suitable for a certain purpose, the performance of that undertaking is a condition precedent to any obligation on the part of the purchaser to pay for the article purchased. *Forbes v. Pausinsky*, 14 Ill. App. 17; *Stein v. Metzger*, 18 Ill. App. 251; *Underwood v. Wolf*, 131 Ill. 425.

Appellant next contends that the contract of April 1, 1910, amounted to a settlement and satisfaction of all claims for damages appellee had resulting from any breach of the contract of July 7, 1909; that by the making of the contract of April 1, 1910, the contract of July 7, 1909, and all rights of the parties under it were extinguished, and that the court erred in instructing the jury that the original contract was or could be the basis of a right of action.

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This contention is untenable for several reasons. The contract of April 1, 1910, does not purport on its face to supersede the contract of July 7, 1909, but is supplemental to it and dependent on it. It does not purport to be an adjustment of any rights of action by either party against the other growing out of a breach of the contract of July 7, 1909. It is a mere *promise to adjust* the differences that have arisen. While the contract of April 1, 1910, is a formal admission on the part of appellant that the motors furnished by it under the contract of July 7, 1909, were defective and not suitable in the condition in which they were delivered for the purposes for which they were purchased, and while it contains a promise to adjust, perfect and put in first-class condition, the motors delivered under the contract of July 7, 1909, and to allow credit to appellee for "all expenses, *such as* (the italics are ours) freight on cars which have been returned by agents on account of motor trouble, expenses incurred in plant of party of the second part (appellee), and any and all traveling expenses or other expenses which have been paid or incurred by party of the second part to make good with its respective customers on account of motor engine troubles, and when cars have been returned for motor and other car defects, the expense chargeable against party of the first part is to be prorated." There is no reference to damages "such as" loss of profits, or any other damage except "expense," and the covenant to allow credit for the expense is executory. An agreement to do a thing in consideration of the settlement of a controversy or claim is not a satisfaction. It is the doing of the thing agreed upon that has that effect. As Mechem in his work on Sales, vol. 2, page 678, sec. 806, says:

"It is not the second contract but the performance of it which discharges the original contract."

In *First Nat. Bank of Arkansas City v. Leech*, 36 C. C. A. 262, 94 Fed. 310, the Court said:

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“An agreement or accord which is to operate as a satisfaction of an existing liability must, before it can have that effect, be fully executed. It is not enough that there be a clear agreement or accord and a sufficient consideration; but the agreement or accord must be executed before it can be pleaded as an accord and satisfaction. If part of the consideration agreed on be not performed, the whole accord fails.”

See also *City of Memphis v. Brown*, 20 Wall. (U. S.) 289, 308, 309, 22 L. Ed. 264; *Clifton v. Litchfield*, 106 Mass. 34, 40, 41; *Crow v. Kimball Lumber Co.*, 16 C. C. A. 127, 69 Fed. 61; *Coblentz v. Wheeler & Wilson Mfg. Co.*, 40 Ark. 180; *Ogilvie v. Hallam*, 58 Iowa 714; 1 Smith, Lead. Cas. (5th Am. Ed.) 445, 446, and cases there cited; *Henderson v. McRae*, 148 Mich. 324.

It is next insisted that the court erred in permitting evidence to be introduced as to alleged damage by reason of prospective profits and in instructing the jury on that subject. As a general proposition the measure of damage in case of a breach of a warranty of the quality of an article of property sold is the difference between the value of the article delivered and what it would have been worth if it had been as warranted. If, however, the article is sold for a certain specific purpose, and the seller knows it, and warrants it to be of a particular quality and to be suitable for the purposes for which it is sold, if it is not as warranted, and articles of the kind and quality contracted for cannot be then purchased in the open market, the value of the article for such special purpose is the basis of estimating damage. If the special purpose for which the article is to be used is a resale, or the production of some other article to be sold, then the profits that would have been made thereby are proper elements of damage in case of a breach of the warranty, provided it be established by the evidence to a reasonable certainty that the same would have been sold as contemplated and how much profit would have been realized from the transaction. Mechem on Sales, vol. 2, sec.

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1821; *Vickery v. McCormick*, 117 Ind. 594; *Loescher v. Deisterberg*, 26 Ill. App. 520; *Armeny v. Madson & Buck Co.*, 111 Ill. App. 621; Sutherland on Damages, vol. 1, p. 91; *McHose v. Fulmer*, 73 Pa. St. 365; *Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co.*, 5 C. C. A. 190, 55 Fed. 451; *McKay v. Riley*, 65 Cal. 623; *Bluegrass Cordage Co. v. Luthy*, 98 Ky. 583; *Kenney v. Knight*, 127 Fed. 403; *Guenther v. Taylor*, 23 Ky. Law Rep. 536; *More v. Knox*, 52 App. Div. (N. Y.) 145; *Beeman v. Banta*, 118 N. Y. 538; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147; *Swain v. Schieffelin*, 134 N. Y. 471; *A. J. Anderson Elect. Co. v. Cleburne Water, Ice & Lighting Co.* (Tex. Civ. App.), 44 S. W. 929; *Consumers' Ice Co. v. Jennings*, 100 Va. 719; *Border City Ice & Coal Co. v. Adams*, 69 Ark. 219; *Burr v. Redhead, Norton, Lathrop Co.*, 52 Neb. 617; *Chapman v. Kirby*, 49 Ill. 211; *Roberts, Wicks & Co. v. Lee*, 31 Ky. Law Rep. 266; *Rhodes v. Holladay-Klotz Land & Lumber Co.*, 105 Mo. App. 279; *Reagan Round Bale Co. v. Dickson Car Wheel Co.*, 55 Tex. Civ. App. 509; *Wilson v. Wernwag*, 217 Pa. St. 82; *Richner v. Plateau Live Stock Co.*, 44 Colo. 302; *Carlson v. Stone-Ordean-Wells Co.*, 40 Mont. 434; *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44; *Talcott v. Freedman*, 149 Mich. 577; *Lissberger v. Kellogg*, 78 N. J. Law, 85; *Thorn v. Morgan & Whateley Co.*, 135 Mich. 51; *Fred W. Wolf Co. v. Calbraith*, 35 Tex. Civ. App. 505; *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70; *Johnson v. Faxon*, 172 Mass. 466; *Moody v. Peirano* (Cal. App.), 84 Pac. 783.

The motors here involved were purchased for the express purpose of being installed in automobiles and sold, and were warranted to be free from defects of material and workmanship; that the material and workmanship should be thoroughly high class, and that they should be fit for the purpose for which they were purchased. It was not error to admit evidence of the loss of prospective profits.

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It was error, however, to submit to the jury by instructions the question of loss of prospective profits until there was evidence from which the jury could determine how much such profits would have been. There was proof amply sufficient to warrant a jury in finding that some automobiles equipped with the motor in question were sold that were not accepted or that were returned because of defects in the motor, but there is no proof to which our attention has been called, or that we have found in this record of nearly 1800 pages, even tending to show how much profit would have been realized on such sales. There is also a dearth of evidence on the question whether other motors of the kind and quality of the ones contracted for by appellee were obtainable in the market at the time of the breach of the contract of July 7, 1909.

During the trial several parts of the motors furnished by appellant under its contract were introduced in evidence by appellee. It is claimed by appellant that no sufficient foundation was laid for their introduction.

In view of the fact that this judgment must be reversed for other reasons, it would serve no useful purpose to go into a detailed analysis of the proof offered in connection with the introduction of those parts. It is enough to say that the admission of that class of exhibits is largely a matter of discretion with the trial judge, and unless such discretion is abused its admission will not constitute reversible error. *American Exp. Co. v. Spellman*, 90 Ill. 455; *Goodrich v. Chicago Great Western Ry. Co.*, 148 Ill. App. 579. When exhibits of that character are offered, there should be proof that they are at the time they are admitted in evidence in the same or at least in substantially the same condition that they were when such condition was material to the issues being tried, or if they have been broken, worn, altered or marred since such time, the court should require evidence to show in what particu-

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lar they have been changed; the use to which they were put to produce the wearing, and where material, the test or circumstances under which they were broken or marred, and this should be done whether they are introduced to prove a fact or for the purpose of illustration. While the preliminary proof concerning these exhibits is not in all respects very satisfactory, we are not inclined to hold that their admission was an abuse of the discretion vested in the court.

Among the customers of appellee to whom were sold automobiles into which motors furnished by appellant under the contract of July 7, 1909, were installed, and who found them not satisfactory, were L. S. Gantz of Marshalltown, Iowa, and Frank L. Haller of Omaha, Nebraska. Each of these gentlemen wrote letters to appellee concerning the Staver car in general and the motor furnished for it by appellant in particular, in which they condemn the motor in unstinted terms and in which they praise the car in all respects, except the motor. The letter written by Gantz was dated April 9, 1910. The letter written by Haller was dated five days later. These letters were offered in evidence by appellee and were admitted by the court over the objection of counsel. This was clearly error. The letters were hearsay evidence. They were mere declarations of strangers to the record made out of the presence of the party against whom they were offered and were clearly incompetent under all rules of evidence. We are satisfied from the character of these letters that their admission could not be otherwise than harmful.

The first instruction given at the instance of appellee is, in part, as follows:

“ * * * And you are further instructed, that under said provisions of that contract, the fact (if the jury find it from the evidence to be a fact) that the motors in question corresponded to the specifications as to size, dimensions, style and type would not alone be sufficient to fulfill the requirements of the contract,

but said motors should have been free from defects of material and workmanship should be high-class and fit for use in such Staver automobiles as they were furnished for, *and of such a character as to make said automobiles, if not otherwise defective, reasonably saleable and marketable and usable when subjected to such use as automobiles are ordinarily put.* * * *

(The italics are ours.)

The language in italics is complained of and is not defensible. By it the jury were told that appellant was required by its contract to furnish motors that would render the cars in which they were installed reasonably saleable, if not otherwise defective, no matter how ungainly in appearance; what price was charged for them; how ancient the model, or how well or how poorly they were equipped with modern improvements. It is a matter of common knowledge that there are many things that tend to make a car saleable or unsaleable besides the quality of the motor or "defects" in other parts. Appellant did not contract to deliver a motor that would render the cars in which they were installed saleable, but that all motors manufactured and sold should be free from all defects of material and workmanship; that the workmanship should be thoroughly high class, and that the motors should be "fit for the purposes for which they are furnished." Instruction number fifteen, given at the instance of appellee, is objectionable for much the same reason as instruction number one just commented on. Instruction number twenty-three is bad in that it assumes that there was a market value for motors in the condition the motors in question were when they were received by appellee.

Inasmuch as it is unlikely that the evidence upon the next trial will be in all respects identical with that contained in this record, we refrain from a discussion of the question whether the verdict is contrary to the weight of the evidence, as well as all other questions involving purely questions of fact.

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For the reasons suggested the judgment of the Circuit Court is reversed and the cause is remanded to that court for a new trial.

Judgment reversed and cause remanded.

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